No. 89-204

AUG 2 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

MINDY HYMOWITZ and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

ELIZABETH TIGUE, et al.,

Respondents.

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether a state court violates due process by allowing the award of tort damages against a defendant that concededly could not have caused injury to the plaintiff or where there is concededly no "reasonable link between liability and the risk created by [the] defendant to a particular plaintiff."

2. Whether a state statute reviving previously time-barred tort claims—arising from use of only five arbitrarily selected products—deprives defendants of property without due process of law or violates the Equal Protection Clause.

LIST OF PARTIES

The decision below involved four separate appeals which were consolidated for argument and decision by the New York Court of Appeals. Three of those four appeals are the subject of this petition. The parties involved in the three cases before this Court are as follows:

Hymowitz v. Eli Lilly & Co.

Plaintiff	Mindy Hymowitz
Intervenor	Attorney General of the State of New York
Defendants-appellants in court of appeals	Eli Lilly & Co.; Abbott Laboratories; The Upjohn Co.; Merck & Co.; E.R. Squibb & Sons, Inc.*
Defendants	Ayerst Laboratories (a division of American Home Products Corp.); Winthrop Laboratories (a division of Sterling Drug, Inc.)

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* Petitioner E. R. Squibb & Sons, Inc. is a wholly-owned subsidiary of Squibb Corporation. The affiliates and subsidiaries (other than wholly-owned subsidiaries) of Squibb Corporation are Squibb-Marsam, Inc.; Squibb-Novo, Inc.; Chesapeake Biological Laboratories, Inc.; Medaphis Corporation; Squibb of Bangladesh, Ltd.; Squibb Industria Quimica, S.A.; P.T. Squibb Indonesia; Squibb Korea Limited; Squibb Pakistan Ltd; Von Heyden Gesellschaft Mit Beschrankter Haftung; Manufactureros Quimicos Farmaceuticos S.A.; Synbiotics Limited; R.C.S. Realty Corporation; Sino-American Shanghai Squibb Pharmaceuticals, Inc.; and Squibb (Nigeria) Limited.

On July 26, 1989, Squibb Corporation, Bristol-Myers Company and Screen Co., a wholly-owned subsidiary of Bristol-Meyers, executed an agreement and plan of merger which provides, among other things, that upon consummation of the merger, Squibb Corporation will become a wholly-owned subsidiary of Bristol-Myers.

Tigue v. E.R. Squibb & Sons, Inc.

Plaintiffs	Elizabeth Tigue; Barbara Tigue; and Sayre Margolies (as Administratrix of the Estate of Myrna Margolies)
Defendants-appellants in court of appeals	E. R. Squibb & Sons, Inc.; Abbott Laboratories; Merck, Sharpe & Dohme (a division of Merck & Co.); Rexall Drug Co.; The Upjohn Co.; William H. Rorer, Inc.; Boyle & Co. Pharmaceuticals
Defendants	Amfre-Grant, Inc. (a subsidiary of Ormont Drug & Chemical Co.); Carnrick Laboratories (a division of G.W. Carnrick Co.); Cole Pharmaceutical Co.; Kremers-Urban Co.; Jerome Schneider, M.D.

Dolan v. Eli Lilly & Co.

Plaintiff	Jane Dolan
Intervenor	Attorney General of the State of New York
Defendants-appellants in court of appeals	Eli Lilly & Co.; E.R. Squibb & Sons, Inc.; The Upjohn Co.
Defendant	Winthrop-Breon Laboratories

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E. R. Squibb & Sons, Inc., respectfully prays that a writ of certiorari issue to review the judgments and opinion of the New York Court of Appeals entered on April 4, 1989.

OPINIONS BELOW

The opinion of the New York Court of Appeals in four cases (of which three are appealed here), consolidated for argument and decision as *Hymowitz v. Eli Lilly & Co.*, is reported at 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069 (1989), and is reprinted in the Appendix at 1a-34a.[1] The opinions of the lower courts in two of the cases are reported as *Hymowitz v. Eli Lilly & Co.*, 136 Misc.2d 482, 518 N.Y.S.2d 996 (Sup. Ct. N.Y. Co. 1987) (App. 44a-54a), *aff'd*, 139 A.D.2d 437, 526 N.Y.S.2d 922 (1st Dep't 1988) (App. 35a-36a); and *Tigue v. E.R. Squibb & Sons, Inc.*, 136 Misc.2d 467, 518 N.Y.S.2d 891 (Sup. Ct. N.Y. Co. 1987) (App. 55a-65a), *aff'd*, 139 A.D.2d 431, 526 N.Y.S.2d 825 (1st Dep't 1988) (App. 37a-41a). The unreported decision of the Supreme Court, New York County, in *Dolan v. Eli Lilly & Co.* is reproduced at App. 66a-73a; its affirmance is reported at 139 A.D.2d 978, 527 N.Y.S.2d 331 (1st Dep't 1988) (App. 42a-43a).

JURISDICTION

The judgments of the New York Court of Appeals effectively rejecting petitioner's federal constitutional claims were entered on April 4, 1989. No rehearing was sought. By order dated June 23, 1989, Justice Marshall extended Squibb's time to petition for certiorari to and including August 2, 1989. This Court has certiorari jurisdiction under 28 U.S.C. § 1257(a).

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1 In this petition, all parenthetical references to a number followed by the letter "a" (*e.g.*, "3a," "27a") refer to pages of the separately bound Appendix to the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4 of chapter 682, Act of July 30, 1986, 1986 New York Laws 1567, provides in pertinent part:

> "Notwithstanding any other provision of law, . . . every action for personal injury . . . or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinyl-chloride upon or within the body . . . which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act . . . ."

INTRODUCTION

At issue in this case is whether a state court can radically and retroactively expand common law tort liability by eliminating the fundamental requirement of individualized assessment of a defendant's liability. Under the rule adopted by the court below, a plaintiff can now take petitioner Squibb's property through judicial process even though the likelihood is concededly "very remote" that Squibb actually injured the plaintiff (App. 9a).

Squibb's responsibility is presumed upon mere proof that it belongs to an industry of some 200-300 members, of which one member allegedly may have injured the plaintiff. As the court below acknowledged, this rule of "non-identification" liability permits damage awards absent any "*reasonable link* between liability and the risk created by a defendant to a particular plaintiff" (App. 17a; emphasis added).

Indeed, by making liability turn on the creation of risk "to the public at large" (*id.*), the court below has allowed a plaintiff to exact damages even from a defendant that conclusively proves its product was not the source of plaintiff's alleged injuries (*id.*). This "non-exculpation" rule allows a finding of liability even when the evidence conclusively demonstrates innocence.

The attraction of taxing a deep-pocket defendant to pay for an allegedly serious injury is clear. But judicial imposition of collective guilt, with no opportunity for individual exculpation, raises profound constitutional questions.

The impact of New York's judge-made rule of non-identification, non-exculpation liability is compounded here by a discriminatory new statute of limitations. Substantial due process and equal protection questions are raised by the so-called "revival" statute, which singled out petitioner's product as one of five substances as to which stale claims—including claims known to the plaintiffs during the old limitations period—were revived.

STATEMENT OF THE CASE

A. *DES and the Litigation of DES Claims.*

Over the past two decades, lawsuits alleging injury from the drug diethylstilbestrol, or DES, have been brought throughout the country. Plaintiffs claim that they were exposed to DES when their mothers allegedly took the drug to prevent miscarriage of the pregnancies that culminated in plaintiffs' births. Plaintiffs' injuries allegedly do not appear until many years later. As a result, most plaintiffs cannot prove which of several hundred potential defendants produced the DES their mothers allegedly took.

DES duplicates the physiological effects of estrogens, the natural female sex hormones, which are essential to fertility and successful pregnancy. DES was first synthesized by British researchers in the late 1930's. Compared to natural estrogens, DES is inexpensive and easy to produce. Instead

of requiring often painful injections, it is effective when taken orally. DES "was accordingly regarded as a revolutionary breakthrough in biomedical science." *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 420 (D.C. Cir. 1988). It made "estrogen therapy available for the first time to all women." *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1009 (D.S.C. 1982).

The U. S. Food & Drug Administration ("FDA") first approved DES as safe for use in treating certain non-pregnancy related conditions in 1941. *See Tidler*, 851 F.2d at 420; *Ryan*, 514 F. Supp. at 1009-10; *Martin v. Abbott Laboratories*, 102 Wash.2d 581, 689 P.2d 368, 374 (1984). It is still "in use today with full approval of the FDA and the Surgeon General" for treatment of those conditions, *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185, 189-90 (1979), and others including some breast and prostate cancers. *See* 36 Fed. Reg. 21538 (1971).

In 1947, the FDA approved use of DES in treating certain endocrine-produced disturbances of pregnancy, including spontaneous abortions or miscarriages. By the early 1950's, the FDA had concluded that DES was "generally recognized . . . as safe" for pregnancy use, *Ryan*, 514 F. Supp. at 1011 & n.3, as had been confirmed by independent researchers in the field.

DES was widely recommended by medical experts and prescribed by doctors for preventing miscarriages. Some 200-300 suppliers ultimately distributed products that contained generic DES as the active ingredient. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. 1984). It was taken by an estimated 1.5-3 million pregnant women during the period 1947-1971. *See Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, 927, *cert. denied*, 449 U.S. 912 (1980).

In none of the extensive clinical studies leading to the approval of DES (nor in any studies during over 20 years of use thereafter) was there evidence of danger to the mother or fetus. Indeed, during normal pregnancy the fetus is exposed to estrogen levels hundreds of times greater than those in

non-pregnant women. In 1971, however, Dr. Arthur Herbst published an article which purported to show a statistical association between a form of vaginal cancer in young women and prenatal exposure to DES.[2] Shortly thereafter, the FDA barred use of DES during pregnancy. *See, e.g., Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 169, *cert. denied*, 469 U.S. 833 (1984); *Lyons*, 406 A.2d at 189. Herbst's article has been cited literally hundreds of times since 1971. Yet not a single subsequent controlled epidemiologic study has verified Herbst's claims nor causally linked DES to vaginal cancer or other serious abnormalities.

Although the Herbst article is the essential basis for claims that prenatal DES exposure causes cancer, Herbst's raw statistical data have never been made available for scientific peer review and criticism or subjected to cross-examination in court. *See Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 560, 563 (7th Cir. 1984). More recent studies question the validity of Herbst's purported statistical associations and suggest that prenatal DES exposure does not cause the alarming increases in cancer claimed by plaintiffs.[3] Most significantly, *all* the reproductive ailments claimed by plaintiffs to be caused by DES can and do occur in women who were never exposed to the drug. *See, e.g.*, n. 3 above; *Burnside v. Abbott Laboratories*, 351 Pa.Super. 264, 505 A.2d 973, 988 (1985).

In response to the inability of DES plaintiffs to identify the supplier of the drug that allegedly injured them, the lower courts have reached widely divergent and often conflicting results. The fundamental importance of individualized

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2 Herbst, *et al.*, *Adenocarcinoma of the Vagina—Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women*, 284 New Eng. J. Med. 878 (1971).

3 *See, e.g.*, McFarlane, *et al.*, *Diethylstilbestrol and Clear Cell Vaginal Carcinoma*, 81 Am. J. Med. 855 (1986); Mantel, "Some Problems With Investigations and Epidemiologic Studies Relating to Pregnancy," in *Prevention of Physical and Mental Congenital Defects*, pp. 45-48 (Marois ed. 1985).

factfinding has led most courts to dismiss cases where plaintiffs cannot identify the proper defendant.[4] Several states have adopted non-identification liability, but in forms that differ substantially from each other.[5] Still others have left the question open.[6] All states but New York, however, permit defen-

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4 *See, e.g., Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 505 A.2d 973 (1985); *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (1981); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589 (D.S.C. 1981); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978).

In addition, a number of courts have rejected non-identification liability in cases involving other products. *See, e.g., Shackil v. Lederle Laboratories,* A.2d , No. A/16/17/18 (N.J. July 31, 1989); *Goldman v. Johns-Manville Sales Corp.*, 33 Ohio St.3d 40, 514 N.E.2d 691 (1987); *In re Asbestos Litigation*, 509 A.2d 1116 (Del. Super. 1986), *aff'd*, 525 A.2d 146 (Del. 1987); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985) (Georgia law); *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983) (Louisiana law), *cert. denied*, 465 U.S. 1102 (1984); *Dawson v. Bristol Laboratories*, 658 F. Supp. 1036 (W.D.Ky. 1987); *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964 (W.D.N.C. 1986). *Cf. Senn v. Merrell-Dow Pharmaceuticals, Inc.*, 305 Or. 256, 751 P.2d 215 (1988) (rejecting "market share alternative liability").

5 Under the leading *Sindell* decision in California, *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980), a plaintiff must sue a "substantial percentage" of DES producers, based on national market share figures, and each defendant's share of liability is limited to its market share. *Id.* at 937. *See Brown v. Superior Court*, 44 Cal.3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988). Michigan requires a plaintiff to bring "*all* possible defendants into court", thereafter subjecting them to joint and several liability. *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 173-74, *cert. denied*, 469 U.S. 833 (1984) (emphasis added). In other states, non-identification actions may proceed against only a single DES producer, and defendants' liability can be "inflated" above market share according to differing rules. *See Collins v. Eli Lilly & Co.*, 116 Wis.2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984); *Martin v. Abbott Laboratories*, 102 Wash.2d 581, 689 P.2d 368 (1984); *Smith v. Eli Lilly & Co.*, 173 Ill. App.3d 1, 527 N.E.2d 333 (1988).

6 *See, e.g., Gaulding v. Celotex Corp.*, 772 S.W.2d 66 (Tex. 1989); *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn. 1985); *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982).

dants in non-identification actions to introduce evidence to exculpate themselves. Individual DES defendants, including Squibb, have in fact proven repeatedly that they could not have been responsible for particular plaintiffs' injuries.[7]

In DES cases that have gone to trial, plaintiffs' speculative causation claims have generally failed to impress juries that have seen their lack of persuasive scientific evidence. One Connecticut jury, for example, that heard four months of testimony—including numerous medical experts presented by skilled plaintiffs' counsel—took just two hours to return a special verdict finding that DES did not cause plaintiff's injuries.[8] Though individual verdicts do not preclude claims by other plaintiffs, the fact that all plaintiffs' scientific evidence of causation is largely identical, combined with juries' rejection of that evidence, indicates that defendants are not the "wrongdoers" assumed by the court below.

B. *The New York "Revival" Statute.*

Two of the cases on appeal here would have been barred by the New York statute of limitations were it not for the passage of a special "revival" statute by the legislature. *See* Act of July 30, 1986, ch. 682 § 4, 1986 N.Y. Laws 1567 (p. 2 above). That statute singled out DES, along with four other substances,[9] from a multitude of products believed to cause latent injury. The statute revived claims based on "the latent effects of exposure" that were otherwise barred by, or had been dismissed because of, the statute of limitations.[10]

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7 *See, e.g., Martin*, 689 P.2d at 372 (summary judgment exculpating Squibb); *Burnside*, 505 A.2d at 986.

8 *Miller v. Eli Lilly & Co., et al.*, No. CV-80-0047107S (Conn. Super. Ct. Feb. 13, 1985). *See also, e.g., Flax v. E.R. Squibb & Sons, Inc.*, No. 4174 (Pa.Ct. of Common Pleas (Philadelphia) Sept. 30, 1988) (special verdict that DES did not cause plaintiff's injuries after one-month trial).

9 The other substances were asbestos, polyvinylchloride (PVC), tungsten carbide and chlordane.

10 The same legislation also changed the New York rule that the three-year statute of limitations for personal injury actions, *see* N.Y. Civ. Prac.

C. *The Proceedings Below and Presentation of Federal Questions.*

The three cases that are the subject of this petition were separately briefed in the court of appeals and then consolidated with a fourth action (not appealed from here) for argument and decision. The cases had been certified for appeal by the appellate division. The three cases here at issue are as follows:

1. *The Tigue Action.*

Plaintiffs Elizabeth Tigue, Barbara Tigue and Sayre Margolies filed suit in 1976, individually and as representatives of a class that was never certified. Elizabeth Tigue alleged that as a result of her mother's ingestion of DES, she suffered from adenosis, a benign tissue condition also found in non-DES exposed women. Sayre Margolies, as administratrix of the estate of her daughter Myrna, asserted a claim for wrongful death, alleging that DES she took caused her daughter to develop cancer. Plaintiffs alleged that they could not identify the actual manufacturer of the DES allegedly ingested, and that they therefore would rely upon some theory of "non-identification" liability.[11]

A number of defendants, including Squibb (App. 74a), moved for summary judgment on the grounds that plaintiffs had failed to identify them as the manufacturer of the DES in question, and that any form of non-identification liability was unconstitutional. Certain defendants further affirmatively demonstrated that they did not supply the DES actually taken.[12]

L. & R. § 214(5) (McKinney Supp. 1989), began to run when a plaintiff was last exposed to an allegedly harmful substance. *See Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 478 N.Y.S.2d 853, 467 N.E.2d 517 (1984), *cert. denied*, 469 U.S. 1192 (1985). Under the new law, the limitations period is measured from the date of discovery of the injury. *See* N.Y. Civ. Prac. L. & R. § 214-c, (McKinney Supp. 1989), codifying 1986 N.Y. Laws, ch. 682 § 2.

11 The revival statute is not implicated in the *Tigue* action.

12 Defendant Upjohn showed that the form of DES that it manufactured (a soft gelatinous capsule) was completely inconsistent with the physical

The trial court denied the motions for summary judgment in a published opinion rejecting defendants' constitutional challenges (App. 55a-65a). Although the Appellate Division and the Court of Appeals did not address the constitutional claims, they were presented in defendants' briefs to each court (App. 81a-94a).

2. *The Hymowitz Action.*

Plaintiff Mindy Hymowitz alleged that her action was authorized by the 1986 revival statute. Squibb raised a statute of limitations defense, asserting that the revival provision violated the Due Process and Equal Protection Clauses. The trial court granted plaintiff's motion to strike the limitations defense (App. 44a-54a). The constitutional claims challenging the revival statute were raised in both appellate courts and rejected by them (App. 19a-22a, 35a-36a, 44a-54a).

3. *The Dolan Action.*

Plaintiff Jane Dolan alleged that she was unable to identify the manufacturer of the DES ingested by her mother and that her action was timely by virtue of the revival statute. Squibb and other defendants moved for summary judgment, on the grounds that the revival statute was unconstitutional and that plaintiff had failed to identify the manufacturer of the DES ingested by her mother.

The trial judge denied defendants' motions in an unpublished memorandum decision, relying on his earlier opinions in *Hymowitz* and *Tigue* (App. 66a-73a). Constitutional claims identical to those raised in the *Tigue* and *Hymowitz* actions were raised in the appellate courts (App. 87a-94a). The constitutional challenges to non-identification liability were not discussed by those courts; the

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characteristics of the hard tablets described by Mrs. Margolies and Mrs. Tigue. Defendant Rexall showed that it sold DES only through its own franchised drugstores and that none of the pharmacies patronized by Mrs. Margolies and Mrs. Tigue was a Rexall franchisee. *See* App. 32a-33a.

challenges to the revival statute were rejected (App. 19a-22a, 42a-43a).

D. *The Decision of the New York Court of Appeals.*

As befits an appeal from denial of summary judgment, the opinion of the court of appeals opens by mentioning that plaintiffs "allege that they were injured" by DES (App. 3a). The opinion goes on, however, to state as established fact that "strong evidence links prenatal DES exposure to later development of serious medical problems" (App. 4a), with no mention of the countervailing evidence or the numerous defendants' verdicts in DES cases. Apparently based on these and other allegations, the opinion describes "the insidious nature" of plaintiffs' injuries and asserts that "many manufacturers, each behind a curtain, contributed to the devastation" (App. 11a), finally describing plaintiffs as "the innocent" and the manufacturers as "the wrongdoers" (*id.*).

Faced with plaintiffs' inability to identify the suppliers allegedly responsible for their injuries, the court of appeals imposed a form of non-identification liability that goes well beyond anything adopted by other courts. The court below simply eliminated the ancient requirement of "causation in a single case" (App. 17a). It imposed this "non-identification" liability on DES producers even though it admitted that there is no "reasonable link between liability and the individual risk created by a defendant to a particular plaintiff" (*id.*). Indeed, the court below recognized that "the chance that a particular producer caused the injury is often very remote" (App. 9a). Instead, the court based liability upon a presumed "risk of injury each defendant created to the public at large" throughout the country by producing DES, with that "risk" to be measured by each defendant's "market share" of DES sold for pregnancy use on an otherwise unspecified "national market" basis (App. 16a-17a).

The court conceded that liability is not "based on . . . causation in a single case" (App. 17a) and that its rule "will likely result in a disproportion between the liability of individual manufacturers and the actual injury each manufac-

turer caused" in New York (App. 16a). Indeed, the court admitted that its rule "cannot be founded upon the belief that, over the run of cases, liability will approximate causation" in New York (App. 16a-17a).

Most strikingly, the court of appeals' logic led it to hold that a defendant is liable for DES injuries notwithstanding that uncontroverted evidence establishes it had no connection with the plaintiff whatsoever ("non-exculpation" liability). In the words of the court below, "there should be no exculpation of a defendant who . . . appears not to have caused a particular plaintiff's injury" (App. 17a). The proven fact that a defendant could not have manufactured the DES actually taken by plaintiff's mother "is merely a windfall . . . to escape liability" (*id.*).

Finally, the court held that the revival statute does not violate due process or equal protection (App. 19a-22a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Violates the Most Fundamental Principles of Adjudicatory Due Process by Allowing Damage Awards Where There Is No "Reasonable Link Between Liability" and the Plaintiff's Alleged Injury, As Well As Where A Defendant Concededly Could Not Have Caused the Plaintiff's Injury.[13]

By denying certiorari in *Sindell* and its progeny, this Court has allowed the lower courts to experiment with various

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13 Although the judgments below remand these cases for further proceedings in the state trial courts, they are "final" for purposes of this Court's appellate jurisdiction. *See* 28 U.S.C. § 1257(a); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-87 (1975). The judgments below finally and conclusively resolve all federal questions presented here. Remand proceedings cannot shed material new light upon, or otherwise alter the posture of, the federal questions. A remand would address state issues only, such as whether DES caused plaintiffs' alleged injuries and whether Squibb was negligent. Further, whatever the disposition might be on remand, there is no doubt that identical federal issues will repeatedly arise in the 800 cases now pending or likely to be filed in New York alone (App. 3a, 6a), in most of which the plaintiffs concede—as they do here—that they cannot identify the

forms of non-identification liability. The result has been a decade of confusion and uncertainty, with no consensus developing.[14] Non-identification liability remains an aberration that, as shown below, raises substantial constitutional questions. The court of appeals' decision, in linking non-identification liability with a rule denying defendants the right to exculpate themselves, raises even more fundamental due process concerns. In light of New York's quantum expansion of non-identification liability, this Court should now set constitutional limits on liability without causation.

Individualized determination of guilt is a uniquely judicial duty that stands at the core of "the Anglo-American legal heritage." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring). In making individualized responsibility for a plaintiff's injuries irrelevant and expressly barring individual exculpation, the decision below raises substantial constitutional questions as to whether a court—in the guise of common law decisionmaking—has the power to engage in "social engineering" of a distinctly legislative character. *See Mulcahy* 376 N.W.2d at 76.

A state court's development of its common law is, of course, limited by constitutional constraints. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1963); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). This "Court must examine [the] State's chosen standard to determine whether it satisfies 'the constitutional minimum of

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manufacturer whose product allegedly injured them. Many more cases are pending in other states.

Finally, the decision below renouncing bedrock concepts of causation and personal responsibility—while imposing damage awards even on defendants who concededly did not cause plaintiff any harm—threatens core federal constitutional policies governing irrebuttable and irrational presumptions, adjudicative due process and arbitrary action by the states. *See Cox Broadcasting*, 420 U.S. at 483.

14 *See* pp. 5-7 & nn. 4-6 above. One result is a crazy-quilt of potential liability that makes it impossible to insure rationally against the almost inevitable dangers of pharmaceutical innovation. It also unfairly penalizes

"fundamental fairness'." *Santosky v. Kramer*, 455 U.S. 745, 756 n.8 (1982) (citations omitted).

The requirement that a plaintiff prove that the named defendant was the person who wronged the plaintiff is a fundamental tenet of our legal system.[15] *See, e.g., In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 822 (E.D.N.Y. 1984) ("fundamental principle[ ] . . . that a defendant should not be held responsible for harm he did not cause"); *Mulcahy*, 386 N.W.2d at 76; ("fundamental negligence requirement of proving causation"); *Zafft*, 676 S.W.2d at 247 ("so fundamental a concept of tort law"); *Morton*, 538 F. Supp. at 599-600 ("fundamental requirement of causation"); *Namm*, 427 A.2d at 1125 ("fundamental principle"); *Gray*, 445 F. Supp. at 338 (same); *Tidler v. Eli Lilly & Co.*, 95 F.R.D. 332, 334 (D.D.C. 1982), *aff'd*, 851 F.2d 418 (D.C. Cir. 1988) ("market share theory of liability . . . represents a radical departure"); *Mizell*, 526 F. Supp. at 596 (same); *Bateman v. Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133 (5th Cir. 1986) (characterizing market share liability as "radical expansion"); *Senn*, 751 P.2d at 223 (market share "alternative liability requires a profound change in fundamental tort principles of causation").

Under our civil justice system, a plaintiff cannot recover for "negligence in the air", *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99 (1928); *see Mulcahy*, 386 N.W.2d at 76, and thus it is necessary to prove both that the defendant did something wrong and that it was done to the

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national firms with long histories in the industry, since they are the obvious targets of litigation, while defunct competitors will never have to pay the alleged costs of their negligence.

15 *Cf. Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982) (citations omitted):

> "Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action.'"

plaintiff before the court. Proof of either element alone is not sufficient. *Cf. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 13, 35 (1976) (district court invalidated Black Lung Benefits Act provision on ground that it precluded defense that plaintiff's injury "did not arise out of employment in the particular mines for which [a defendant] was responsible"). The "law does not guarantee relief to every deserving plaintiff." *See Zafft*, 676 S.W.2d at 246; *Bateman*, 781 F.2d at 1133-34 (refusing to adopt market share liability although plaintiff had no other remedy); *Clift v. Nelson*, 25 Wash. App. 607, 608 P.2d 647 (1980) (assault action by police officer struck from behind in mob confrontation dismissed for failure to prove which defendant hit plaintiff).

The rule adopted by the court below amounts in practical effect to a selective tax or social insurance scheme. *See Blackston*, 764 F.2d at 1483 ("elimination of a causation requirement would render every manufacturer an insurer not only of its own products, but also of all generically similar products manufactured by its competitors"). It "is not merely an extension of established legal principles, but an action of wholesale judicial legislation." *See Tidler*, 851 F.2d at 422 (citation omitted); *see also Ryan*, 514 F. Supp. at 1018 (describing *Sindell* as "unprecedented legislation"). By the very nature of the judical process, a court's ability to make legislative type decisions is sharply limited by its narrow focus on the parties before it and the arguments and facts they choose to present, the restrictions on its ability to gather information, and judges' lack of power to levy taxes. In light of these inherent limitations, this Court should consider whether due process permits a state court to perform core legislative functions.

At bottom, this Court must consider whether the decision below ignores the profound distinction between the quantum of proof necessary to meet due process requirements in the fundamentally different contexts of legislative regulation and judicial factfinding. When government seeks to protect its citizens through a prospective administrative or legislative ban on possibly toxic substances, the action may be upheld "even though the probability of harm to any individual

is small . . . the studies necessary to assess risk are incomplete" and there is "a very low probability of any causal relationship." *Agent Orange*, 597 F. Supp. at 781, 785. Where, however, individuals invoke tort law to seek retrospective "compensation for injuries after the fact," *id.* at 781, evidence that might be adequate to justify a prospective regulatory ban "would not be sufficient to find an individual defendant liable to an individual plaintiff." *Id.* at 782. This is because "the law believes it unfair to require an individual to pay for another's tragedy unless it is shown that it is more likely than not that he caused it." *Id.* at 781.

A. *Violation of Constitutional Burden of Proof Requirements.*

The decision below presents the important question whether due process allows a state court to take a defendant's property where the plaintiff cannot prove by a fair preponderance of the evidence that the defendant caused her alleged injury. *See Tidler*, 95 F.R.D. at 334 n.5 (noting due process issue).

This Court has repeatedly recognized that "[t]he function of a standard of proof" under the Due Process Clause "is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979), quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard of proof "serves to allocate the risk of error between the litigants" and reflects a societal judgment as to "the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423.

Of particular relevance here, the Court has recognized that "while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' [*Addington*,] 441 U.S., at 423." *Santosky*, 455 U.S. at 755. "Any other standard expresses a

preference for one side's interests." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). This Court has never even suggested that private property may be taken in a damage award upon proof of anything less than a "fair preponderance of the evidence." When the standard of proof is changed, it is invariably done to protect defendants, *see, e.g. Addington*; *Santosky* ("clear and convincing evidence" required to deprive individuals of certain personal liberties), so as not to disadvantage them by "express[ing] a preference for [plaintiff's] interests." *See Herman & MacLean*, 459 U.S. at 390.

Where private parties have a "relatively equal . . . interest in the outcome . . . it is appropriate that each share roughly equally in the risk of an inaccurate factual determination." *Rivera v. Minnich*, 483 U.S. 574, 581 n.8 (1987). The decision below, however, would judicially deprive Squibb of property where there is no "reasonable link between liability and the risk created" (App. 17a), and where the likelihood is admittedly "very remote" that Squibb injured the plaintiff (App. 9a).

The case thus presents the question whether, under the Due Process Clause, a state court may decide that a particular group of plaintiffs—"the innocent," according to the court of appeals (App. 11a)—is so much more deserving than a particular group of defendants—arbitrarily characterized as "wrongdoers" (*id.*)—that even substantial doubt as to a required element of the tort must be resolved in plaintiffs' favor. This Court has suggested that "in a civil dispute over money damages," *Santosky*, 455 U.S. at 755, such a judicial thumb on the scales of justice is inappropriate because "the State's legitimate interest is in the fair and impartial adjudication of all civil disputes." *Rivera*, 483 U.S. at 581 n.8. Even where "the interests of plaintiffs in such suits are significant"—as where, for example, plaintiffs are "among the very individuals Congress sought to protect"—they "should recover" only "[i]f they prove that it is more likely than not" that the defendant injured them. *Herman & MacLean*, 459 U.S. at 390.

The reason is clear: "the Constitution expressly protects against confiscation of private property." *Lindsey v. Normet*,

405 U.S. 56, 74 (1972). If that Fourteenth Amendment right is to have any substance, it must mean that a person challenging an owner's right to his property must show some greater entitlement to the property than the owner. In other words, property cannot be taken where, as here, the challenger's claim to it is "very remote" (App. 9a) and the court "concedes the lack of a logical link" (App. 18a n.3) between the owner and the challenger.

The New York rule is not justified by the court of appeals' claim that it "apportion[s] liability so as to correspond to the overall culpability of each defendant," measured by each DES producer's "market share" of an undefined "national market" (App. 16a-17a). Our legal system simply does not function that way. As an illustration, consider a pedestrian killed by a speeding hit-and-run driver. Assume that a police video camera a few hundred yards away records 100 cars speeding on the stretch of a highway during the hour in which the victim was struck. No one would seriously contend that the victim's estate could sue all 100 drivers and recover 1% of its damages from each one of them. Having failed to identify the specific wrongdoer, the estate could recover nothing in court.[16]

B. *Non-Identification Liability Creates an Irrebuttable Presumption.*

The decision below also raises the important question whether an unconstitutional irrebuttable presumption is created by allowing non-identification liability with no oppor-

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16 The only widely-accepted circumstance in which courts in this country have allowed recovery against all members of a group in which only one member could have injured the plaintiff is under the so-called "alternative liability" theory of § 433B(3) of the Restatement (Second) of Torts (1965). Under that theory, where two or more defendants act tortiously but there is uncertainty as to which of them caused plaintiff's injury, the burden is shifted to each defendant to prove that he did not cause the harm. *See, e.g., Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948) (two defendant hunters fired negligently in direction of plaintiff, who was injured by a single bullet). *But see Senn* (rejecting alternative liability). Assuming that alternative liability

tunity for exculpation. Under the New York rule, it is conclusively presumed that because Squibb produced *any* DES, it is responsible for producing the DES that was taken by *every* plaintiff's mother. The court of appeals effectively conceded the irrationality of this presumption when it acknowledged the "lack of a logical link between liability and causation in a single case" (App. 18a n.3). Although all non-identification liability imposes an irrebuttable presumption, the problem is most starkly posed by the "non-exculpation" rule, which conclusively presumes that the plaintiff was injured by a manufacturer that proves it did not produce the allegedly offending DES.

"[P]ermanent irrebutable presumptions have long been disfavored under the Due Process Clause." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). A "presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the

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comports with due process, it still does not answer the serious constitutional questions raised by New York's DES liability scheme.

Under the alternative liability theory, the plaintiff must still meet the due process requirement of proving causation. "It must be more probable than not that an injury was caused . . . by some one of the named defendant manufacturers." *Hall v. E. I. DuPont de Nemours & Co.*, 345 F. Supp. 353, 379 (E.D.N.Y. 1972). An alternative liability claim will fail where the plaintiff does not sue enough defendants to meet that standard of causation—that is, where the injury may well have been caused by an actor not named as a defendant. *See id.* at 359, 379 (defendants included all U.S. manufacturers of allegedly dangerous product and their trade association); *Agent Orange*, 597 F. Supp. at 827 (all producers of alleged toxic chemical were defendants). As the court below recognized in rejecting the alternative liability approach here, its "fairness disappears with the decreasing probability that any one of the defendants actually caused the injury" (App. 9a). Presumably out of similar concerns, other courts in DES cases have required plaintiffs to join as defendants all DES producers, *Abel*, 343 N.W.2d at 174; or at least the producers of a "substantial share" of DES. *Sindell*, 607 P.2d at 937.

New York, however, has imposed no such requirement. It allows cases to proceed even against a single manufacturer. Notably in the instant cases, the total of all defendants' market shares is less than 50% (as would be expected in a market of some 200-300 firms). In such factual circumstances, a finding that the "injury was caused . . . by some one of the named defendant manufacturers," *Hall*, 345 F. Supp. at 379, would be pure speculation.

presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969). *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 28 (presumption standards in civil law context).

In the instant cases, no such "substantial assurance" is possible. Indeed, the opposite is true. No DES producer had a majority share of DES sales in the 1950's and 60's, while Squibb's share was about 5-10%. Thus, "a significant percentage," *Leary*, 395 at 46, or a "not inconsiderable proportion," *id.* at 52, of DES—indeed about 90% of DES—was not supplied by Squibb. Accordingly, as a matter of simple mathematics, the only statement that can be made with "substantial assurance" here is that "the presumed fact" that a plaintiff was exposed to DES made by Squibb is *not* "likely . . . to flow from the proved fact" that Squibb manufactured DES. *See Leary*, 395 U.S. at 36. .

An important constitutional question is thus posed by whether New York's DES rule violates the Due Process Clause because it "'operates to deny a fair opportunity to rebut it.'" *Vlandis*, 412 U.S. at 446, quoting *Heiner v. Donnan*, 285 U.S. 312, 329 (1932). It "constitutes an attempt, by [judicial] fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality," *see Heiner*, 285 U.S. at 329—namely, that Squibb's product injured every plaintiff in some proportion related to its market share. Moreover, because New York lacks the constitutional power to "deny[ ] a litigant the right to prove the facts of its case," it cannot "escape from constitutional restrictions" by doing the same thing "in the guise of a rule of substantative law." *Id.*

C. *The Decision Below Amounts to Impermissible Judicial Legislation.*

Under New York's DES rule, all producers are liable for their "market share" of all tort damages allegedly caused by DES, without regard to their connection to a particular plaintiff's injuries. This taking of defendants' property—without proof of individual responsibility for the plaintiff's

injuries—is functionally identical to the imposition of a retroactive tax or social insurance compensation scheme upon all DES producers. *See* p. 14 above. Such retroactive compensation regimes raise serious due process questions, even when imposed by Congressional enactment. *See, e.g., Turner*, 428 U.S. at 16-20.

Yet here, the court of appeals has adopted a system of virtually unlimited victim compensation, based only upon the narrow factual record of a summary judgment motion. In light of the inherent limitations of judicial proceedings (*see* p. 14 above) and the fact that all the conditions allegedly caused by DES also occur absent DES exposure (*see* p. 5 above), the rational basis for the court of appeals' DES rule is open to serious question. *See, e.g., Turner*, 428 U.S. at 17-18 ("we would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness") (citations omitted), 25 ("[t]he damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a 'cost' of the operator's business" which it is rational to charge to the employer); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

The court of appeals' claim that it was merely fulfilling "expectations" that "the legislature consciously created . . . by reviving hundreds of DES cases" (App. 11a) is demonstrably inaccurate. The revival statute was part of a tort reform act passed only after extensive debate over the course of several legislative sessions. As one of its Senate sponsors said just before final passage: "[W]e are changing a statute of limitations here. We are changing a procedural measure. *We are not changing substantive right[s], certainly not retrospectively.*"[17] Thus, the court below simply ignored the express limitations imposed by the democratic branch of government and

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17 Statement of Sen. Connor, 1986 Record of Proceedings, N.Y. Senate at 5152-53; emphasis added). The revival bill's lead Senate sponsor explained:

> "I would emphasize . . . as I have said over and over again, this legislation . . . does not automatically have someone be paid a claim.

enacted its own political predilections into law. A serious question is raised by whether appointed judges, whose function is to adjudicate individual cases, may impose such a scheme.

II. The New York "Revival" Statute Irrationally Singles Out Claims Against DES Manufacturers and Arbitrarily Divests Their Right of Repose Under the Statute of Limitations.

New York's 1986 revival statute (*see* p. 2 above) allowed plaintiffs to file claims—otherwise long barred by the statute of limitations—involving five enumerated substances during the one-year period ending July 30, 1987. The revival statute was justified as an adjunct to a general change in the time from which the limitations period for alleged latent toxic tort injuries runs in New York. Under the new law, the date of discovery of the injury controls, rather than the date of exposure (*see* p. 7 n. 10 above). The claims that were "revived," however, were not limited to those that plaintiffs could not have discovered during the old limitations period. Rather, the statute also allowed suits by plaintiffs who knew of their claims years before the statute had run, but had voluntarily elected not to sue, as well as claims that were otherwise barred by actual judgments on statute of limitations grounds.

In rejecting Squibb's due process challenge to the revival statute, the court of appeals relied primarily upon this Court's decision in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), which held that statutes of limitations are "procedural" and that rights under them exist "only by legislative grace." *Id.* at 314. An important constitutional question is presented by whether the analysis and result of *Chase*—which was based on the outmoded right-privilege distinction—survives this Court's modern redefinition of constitutionally-

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> They . . . have to have their day in court and they have to prove their case. By no means are people automatically going to be paid."

Statement of Sen. Stafford, *id.* at 5147.

protected property rights.[18] The need for review is highlighted by the fact that two state supreme courts have invalidated revival statutes similar to New York's, *see Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989); *Tyson v. Johns-Manville Sales Corp.*, 399 So.2d 263 (Ala. 1981), albeit on state constitutional grounds. Those courts' use of state constitutional provisions is further indication that the continuing usefulness of the *Chase* approach is questionable.

Modern due process analysis defines constitutionally-protected property interests "by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The purpose of the analysis is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* Similarly, modern just compensation analysis identifies protected property by looking to whether state regulation "has interfered with distinct investment-backed expectations." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Statutes of limitations give rise to precisely the sort of reliance interests and "investment-backed expectations" that due process protects. As Justices Bradley and Harlan recognized over a century ago:

> "The immunity from suit which arises by operation of the Statute of Limitations is as valuable a right as the right to bring the suit itself. . . . Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. . . . [I]t is

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18 In addition, even under the outmoded *Chase* analysis, it is not clear that the revival statute is merely "procedural." A truly procedural statute of limitations applies on a general basis to all cases in broad categories. Here, however, by singling out DES and four other substances, while ignoring the many other substances legislatively recognized to produce possible latent injuries (*see* pp. 23-24 below), the revival statute in fact makes substantive distinctions that cannot be rationally justified.

> . . . a right, . . . when vested, . . . as much to be protected as any other right that a man has."

Campbell v. Holt, 115 U.S. 620, 631 (1885) (Bradley, J., dissenting). *See also Tyson*, 399 So.2d at 269 ("the great preponderance of authority favors the view that . . . after a cause of action has become barred by the statute of limitations, the defendant has a vested right . . . or property which cannot be taken away by legislation"). New York recognizes that statutes of limitations confer on defendants the right of repose and the legitimate expectation to be free from stale claims. *See, e.g., Parker v. Port Authority*, 113 A.D.2d 763, 493 N.Y.S.2d 355, 357 (2d Dep't 1985) ("primary purpose of Statutes of Limitation is to relieve defendants of the necessity of investigating and preparing a defense," citing *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944)).

In the instant case, the revival statute directly impinges upon investment-backed expectations that arose by virtue of the former statute of limitations. Freed from potential liability by the expiration of the limitations period, a manufacturer tailors its business decisions accordingly. In DES cases, revival prejudices defendants by the very mischief that rights of repose are intended to prevent: "evidence has been lost, memories have faded, and witnesses have disappeared." *See Railroad Telegraphers*, 321 U.S. at 349. The deprivation is particularly acute where defendants relied on actual judgments of dismissal, which are effectively vacated by the revival statute.

A substantial question is also raised as to whether New York's revival of stale DES claims is irrational and arbitrary, thereby denying petitioner both due process and equal protection. The rationale for revival is to give a day in court to plaintiffs who could not reasonably have discovered their claims earlier. But revival of claims of which the plaintiffs were aware during the former limitations period is inconsistent with that rationale. Such inconsistency between a statutory provision and the general justification for the law

raises serious constitutional questions. *See, e.g., Moreno*, 413 U.S. at 533-34.

Moreover, although it was asserted in enacting the revival statute that it covered "all of the currently known categories of victims of exposure to toxic or harmful substances," *see* 1986 N.Y. Legis. Ann. at 288, that claim is demonstrably inaccurate. For example, the New York Workers Compensation Law specifically lists at least a dozen additional substances that may cause latent injury. *See* N.Y. Work. Comp. L. § 28 (McKinney Supp. 1989). Similarly, New York's prospective change in 1986 to a discovery-based limitations period applied to all substances that may cause latent injury. *See* p. 7 n. 10 above.

In these circumstances, a substantial question is presented by whether it is irrational to single out DES for revival of claims when other substances that the legislature believed to be potentially as or more likely to cause alleged latent injuries are not subject to the same treatment. The legislative history contains no rational justification for the distinction; it appears simply to have been a matter of political expediency. Although, as the court of appeals noted (App. 22a), the legislature may address a problem one step at a time, any line that is drawn must be constitutionally acceptable. An important constitutional question exists as to whether the revival statute meets the applicable due process and equal protection standards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

August 2, 1989

Respectfully submitted,

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(2) No. 89-204 89-20

Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

MINDY HYMOWITZ and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

ELIZABETH TIGUE, et al.,

Respondents.

E. R. SQUIBB & SONS, INC.,

Petitioner,

-against-

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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August 2, 1989

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APPENDIX A

Opinion of the New York Court of Appeals
(April 4, 1989)

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 56
Mindy Hymowitz,
Respondent,
v.
Eli Lilly and Company, et al.,
Appellants,
and Merck & Co., Inc., et al.
Defendants,
Attorney General of the State of New York,
Intervenor-Respondent.

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1 No. 57
Elizabeth Tigue, et al.,
Respondents,
v.
E.R. Squibb & Sons, Inc., et al.
Appellants,
et al.,
Defendants.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

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1 No. 58
Jane Dolan, et al.,
Respondents,
v.
Eli Lilly & Company, et al.,
Appellants.
(and other actions.)
#151 actions

---

1 No. 59
Barbara Hanfling, et al.
Respondents,
v.
Eli Lilly and Company, et al.
Appellants,
et al.,
Defendants.

---

(56) Russel H. Beatie, Jr., Sanford N. Berland, Susan A. Winston, NYC, for appellant Lilly.
Robin J. Stout, Jay P. Mayesh, William A. Rome, NYC, for appellant Upjohn.

Robert M. Dato, David J. Fleming, Santa Monica, Barry M. Epstein, Lindsay H. Lew, NYC, for appellant Squibb.

Karl E. Seib, Jr., Robert D. Wilson, Jr., NYC, for appellant Abbott.

Paul D. Rheingold, NYC, for respondent Hymowitz.

Robert Abrams, Attorney General (Andrea Green, O. Peter Sherwood of counsel) for intervenor-respondent.

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Arthur N. Luxenberg, Morris J. Eisen, Perry Weitz, NYC, for respondents.

WACHTLER, Ch. J.:

Plaintiffs in these appeals allege that they were injured by the drug diethylstilbestrol (DES) ingested by their mothers during pregnancy. They seek relief against defendant DES manufacturers. While not class actions, these cases are representative of nearly 500 similar actions pending in the courts in this state; the rules articulated by the Court here, therefore, must do justice and be administratively feasible in the context of this mass litigation. With this in mind, we now resolve the issue twice expressly left open by this Court, and adopt a market share theory, using a national market, for determining liability and apportioning damages in DES cases in which identification of the manufacturer of the drug that injured the plaintiff is impossible (*see, Kaufman v Lilly & Co.*, 65 NY2d 449, 456; *Bichler v Lilly & Co.*, 55 NY2d 571, 580). We also hold that the Legislature's revival for one year of actions for injuries

caused by DES that were previously barred by the statute of limitations (*see*, L 1986, ch 682, § 4) is constitutional under the State and Federal Constitutions.

I.

The history of the development of DES and its marketing in this country has been repeatedly chronicled (*see, e.g., Bichler v Lilly & Co., supra; Martin v Abbott Labs*, 102 Wash2d 581; *Sindell v Abbott Labs*, 26 Cal3d 588 *cert denied* 449 US 912; Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 Ford L Rev 963). Briefly, DES is a synthetic substance that mimics the effect of estrogen, the naturally formed female hormone. It was invented in 1937 by British researchers, but never patented.

In 1941, the Food and Drug Administration (FDA) approved the New Drug Applications (NDA) of 12 manufacturers to market DES for the treatment of various maladies, not directly involving pregnancy. In 1947, the FDA began approving the NDAs of manufacturers to market DES for the purpose of preventing human miscarriages; by 1951, the FDA had concluded that DES was generally safe for pregnancy use, and stopped requiring the filing of NDAs when new manufacturers sought to produce the drug for this purpose. In 1971, however, the FDA banned the use of DES as a miscarriage preventative, when studies established the harmful latent effects of DES upon the offspring of mothers who took the drug. Specifically, tests indicated that DES caused vaginal adenocarcinoma, a form of cancer, and adenosis, a pre- cancerous vaginal or cervical growth.

Although strong evidence links prenatal DES exposure to later development of serious medical problems, plaintiffs seeking relief in court for their

injuries faced two formidable and fundamental barriers to recovery in this State; not only is identification of the manufacturer of the DES ingested in a particular case generally impossible, but, due to the latent nature of DES injuries, many claims were barred by the statute of limitations before the injury was discovered.

The identification problem has many causes. All DES was of identical chemical composition. Druggists usually filled prescriptions from whatever was on hand. Approximately 300 manufacturers produced the drug, with companies entering and leaving the market continuously during the 24 years that DES was sold for pregnancy use. The long latency period of a DES injury compounds the identification problem; memories fade, records are lost or destroyed, and witnesses die. Thus the pregnant women who took DES generally never knew who produced the drug they took, and there was no reason to attempt to discover this fact until many years after ingestion, at which time the information is not available.

We recognized this predicament in *Bichler v Lilly & Co.* (*supra* at 579), where the Court stated that in DES cases it is a "practical impossibility for most victims [to] pinpoint * * * the manufacturer directly responsible for their particular injury." We allowed plaintiff's recovery in that case, however, notwithstanding the failure of the plaintiff to identify the manufacturer of the injurious DES, on the limited basis that "the evidence was legally sufficient to support the jury verdict for the plaintiff" on the law as charged to the jury, and unobjected to by the defendant (*see, Kaufman v Lilly & Co.*, 65 NY2d 449, 456). The question, therefore, of whether non-identification of the manufacturer precludes plaintiffs from recovering for DES caused injuries, remained unresolved after *Bichler v Lilly & Co.* (*supra*).

The second barrier to recovery, involving the statutue of limitations, arose from the longstanding rule in this State that the limitations period accrued upon exposure in actions alleging personal injury caused by toxic substances (*Fleishman v Lilly & Co.*, 62 NY2d 888, *cert denied* 469 US 1192). In *Fleishman v Lilly & Co.* (*supra*) it became clear that this exposure rule led to many DES cases being barred by the statute of limitations before the discovery of injury; we held, however, that any change in the accrual date from exposure to discovery was more properly the prerogative of the Legislature (*id.* at 890; *see, id.* at 891 [Cooke, Ch. J., dissenting]). Four years after *Fleishman v Lilly & Co.* the Legislature addressed the statute of limitations problem, and instituted a discovery rule for "the latent effects of exposure to any substance" (L 1986, ch 682, §2). The Legislature also, for one year, revived causes of action for exposure to DES that had been time barred (L 1986, ch 682, § 4).

It is estimated that eventually 800 DES cases will be brought under the revival portion of this recent statute. Moreover, as indicated in *Bichler v Lilly & Co.* (*supra*), and as apparent from the record now before the Court, in the vast majority of these cases identification of the manufacturer of the DES that injured the plaintiff will be impossible. The Legislature, however, while reviving these time-barred actions, did not resolve the identification problem.

The present appeals are before the Court in the context of summary judgment motions. In all of the appeals defendants moved for summary judgment dismissing the complaints because plaintiffs could not identify the manufacturer of the drug that allegedly injured them. In three of the appeals defendants also moved on statute of limitations grounds, arguing that the revival of the

actions was unconstitutional under the State and Federal Constitutions, and that the complaints, therefore, are time barred and should be dismissed. The trial court denied all of these motions. On the statute of limitations issue, the trial court also granted plaintiffs' cross motions, [sic] dismissing defendants' affirmative defenses that the actions were time barred. The Appellate Division affirmed in all respects and certified to this Court the questions of whether the orders of the trial court were properly made. We answer these questions in the affirmative.

II.

In a products liability action, identification of the exact defendant whose product injured the plaintiff is, of course, generally required (*see, e.g., Morrissey v Conservative Gas Corp.*, 285 AD 825, *affd* 1 NY2d 741; Prosser & Keeton, Torts §103, at 713 [5th ed]). In DES cases in which such identification is possible, actions may proceed under established principles of products liability (*Bichler v Lilly Co. supra* at 579). The record now before us, however, presents the question of whether a DES plaintiff may recover against a DES manufacturer when identification of the producer of the specific drug that caused the injury is impossible.

A.

As we noted in *Bichler v Lilly Co.* (*supra* at 580, n5), the accepted tort doctrines of alternative liability and concerted action are available in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible. However, we agree with the near unanimous vies of the high state courts that have considered the matter that these doctrines in their unaltered commonlaw forms do not permit recovery in DES cases (*see, e.g., Sindell v Abbott*

Labs, supra; Collins v Lilly & Co., 116 Wis2d 166; *Martin v Abbott Labs, supra; but see, Abel v Lilly & Co.*, 418 Mich 311 [held that there was a question of fact presented as to alternative liability and concerted action]).

The paradigm of alternative liability is found in the case of *Summers v Tice* (33 Cal2d 80). In *Summers* (*supra*), plaintiff and the two defendants were hunting, and defendants carried identical shotguns and ammunition. During the hunt, defendants shot simultaneously at the same bird, and plaintiff was struck by birdshot from one of the defendants' guns. The court held that where two defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury, "the burden is upon such actor to prove that he has not caused the harm" (Restatement [Second] of Torts §433B[3]; *Bichler v Lily & Co., supra* at 580, n 5; *cf., Ravo v Rogatnick*, 70 NY2d 305 [successive tortfeasors may be held jointly and severally liable for an indivisible injury to the plaintiff]). The central rationale for shifting the burden of proof in such a situation is that without this device both defendants will be silent, and plaintiff will not recover; with alternative liability, however, defendants will be forced to speak, and reveal the culpable party, or else be held jointly and severally liable themselves. Consequently, use of the alternative liability doctrine generally requires that the defendants have better access to information than does the plaintiff, and that all possible tortfeasors be before the court (*see, Summers v Tice, supra* at 86; Restatement [Second] of Torts §433B, comment h). It is also recognized that alternative liability rests on the notion that where there is a small number of possible wrongdoers, all of whom breached a duty to the plaintiff, the likelihood that any of them injured the plaintiff is

relatively high, so that forcing them to exonerate themselves, or be held liable, is not unfair (*Sindell v Abbott Labs, supra* at 139).

In DES cases, however, there is a great number of possible wrongdoers, who entered and left the market at different times, and some of whom no longer exist. Additionally, in DES cases many years elapse between the ingestion of the drug and injury. Consequently, DES defendants are not in any better position than are plaintiffs to identify the manufacturer of the DES ingested in any given case, nor is there any real prospect of having all the possible producers before the court. Finally, while it may be fair to employ alternative liability in cases involving only a small number of potential wrongdoers, that fairness disappears with the decreasing probability that any one of the defendants actually caused the injury. This is particularly true when applied to DES where the chance that a particular producer caused the injury is often very remote (*Sindell v Abbot Labs, supra* at 603; *Collins v Lilly & Co., supra* at 184). Alternative liability, therefore, provides DES plaintiffs no relief.

Nor does the theory of concerted action, in its pure form, supply a basis for recovery. This doctrine, seen in dragTpart of all defendants having an understanding, express or tacit, to participate in "a common plan or design to commit a tortious act" (Prosser & Keeton, Torts §46, at 323 [5th ed]; *see Bichler v Lilly & Co., supra* at 580-581; *De Carvalho v Brunner*, 223 NY 284). As we noted in *Bichler v Lilly & Co.*, and as the present record reflects, drug companies were engaged in extensive parallel conduct in developing and marketing DES (*see, id.* at 585). There is nothing in the record, however, beyond this similar conduct to show any agreement, tacit or otherwise, to market DES for

pregnancy use without taking proper steps to ensure the drug's safety. Parallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim (*Sindell v Abbot Labs, supra* at 605; *Collins v Lilly & Co., supra* at 85; *Martin v Abbott Labs, supra* at 599.) Thus this theory also fails in supporting an action by DES plaintiffs.

In short, extant common law doctrines, unmodified, provide no relief for the DES plaintiff unable to identify the manufacturer of the drug that injured her. This is not a novel conclusion; in the last decade a number of courts in other jurisdictions also have concluded that present theories do not support a cause of action in DES cases. Some courts, upon reaching this conclusion, have declined to find any judicial remedy for the DES plaintiffs who cannot identify the particular manufacturer of the DES ingested by their mothers (*see, Zafft v Lilly & Co.*, 67 SW2d 241 [Mo] [en banc]; *Mulcahy v Lilly & Co.*, 386 NW2d 67 [Iowa] [stating that any change in the law to allow for recovery in non-identification DES cases should come from the legislature]). Other courts, however, have found that some modification of existing doctrine is appropriate to allow for relief for those injured by DES of unknown manufacture (*e.g., Sindell v Abbot [sic] Labs, supra; Collins v Lilly & Co., supra; Martin v Abbott Labs, supra*).

We conclude that the present circumstances call for recognition of a realistic avenue of relief for plaintiffs injured by DES. These appeals present many of the same considerations that have prompted this Court in the past to modify the rules of personal injury liability, in order "to achieve the ends of justice in a more modern context" (*see, People v Hobson*, 39 NY2d 479, 489; Codling V Paglia, 32 NY2d 330, 341), and we perceive that here

judicial action is again required "to overcome the inordinately difficult problems of proof" caused by contemporary products and marketing techniques (*see, Bichler v Lilly & Co., supra* at 579-580 [*quoting Caprara v Chrysler Corp.*, 52 NY2d 114, 123]).

Indeed, it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the insidious nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers. This is particularly so where the legislature consciously created these expectations by reviving hundreds of DES cases. Consequently, the ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES (*see, Woods v Lancet*, 303 NY 349, 355; see, also, Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 Cornell L. Rev. 1004).

We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions. Given this unusual scenario, it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action. We turn then to the question of how to fairly and equitably apportion the loss occasioned by DES, in a case where the exact manufacturer of the drug that caused the injury is unknown.

B.

The past decade of DES litigation has produced a number of alternative approaches to resolve this question. Thus, in a sense, we are now in an enviable position; the efforts of other courts provided examples for contending with this difficult issue, and enough time has passed so that the actual administration and real effects of these solutions now can be observed. With these useful guides in hand, a path may be struck for our own conclusion.

First, this Court's opinion in *Bichler v Lilly & Co.* (*supra*) must be considered. There the jury was instructed on a modified version of concerted action, which, in effect, substituted the fact of conscious parallel activity by manufacturers for the usual common law requirement that there be proof of an actual agreement between actors to jointly act tortiously (*id.* at 584). The defendant in Bichler did not object to this instruction, and the modified concerted action theory became the law applicable to that particular case (*id.* at 583- 584).

Now given the opportunity to assess the merits of this theory, we decline to adopt it as the law of this State. Parallel behavior, the major justification for visiting liability caused by the product of one manufacturer upon the head of another under this analysis, is a common occurrence in industry generally. We believe, therefore, that inferring agreement from the fact of parallel activity alone improperly expands the concept of concerted action beyond a rational or fair limit; among other things, it potentially renders small manufacturers, in the case of DES and in countless other industries, jointly liable for all damages stemming from the defective products of an entire industry (accord, *Sindell v Abbot Labs, supra* at 605).

A narrower basis for liability, tailored more closely to the varying culpableness of individual DES producers, is the market share concept. First judicially articulated by the California Supreme Court in *Sindell v Abbott Labs (supra)*, variations upon this theme have been adopted by other courts (*see, Collins v Lilly & Co., supra; Martin v Abbott Labs, supra*). In *Sindell v Abbott Labs* (*supra*), the Court synthesized the market share concept by modifying the *Summers v Tice* (*supra*) alternative liability rationale in two ways. It first loosened the requirement that all possible wrongdoers be before the court, and instead made a "substantial share" sufficient. The court then held that each defendant who could not prove that it did not actually injure plaintiff would be liable according to that manufacturer's market share. The court's central justification for adopting this approach was its belief that limiting a defendant's liability to its market share will result, over the run of cases, in liability on the part of a defendant roughly equal to the injuries the defendant actually caused (*id.* at 612).

In the recent case of *Brown v Superior Court* (44 Cal3d 1049), the California Supreme Court resolved some apparent ambiguity in *Sindell v Abbott Labs*, and held that a manufacturer's liability is several only, and, in cases in which all manufacturers in the market are not joined for any reason, liability will still be limited to market share, resulting in a less than 100% recovery for a plaintiff. Finally, it is noteworthy that determining market shares under *Sindell v Abbott Labs* proved difficult and engendered years of litigation. After attempts at using smaller geographical units, it was eventually determined that the national market provided the most feasible and fair solution, and this national market information was compiled (*see, In re Complex DES Litigation*, No. 830/109 Cal Super Ct).

Four years after *Sindell v Abbott Labs*, the Wisconsin Supreme Court followed with *Collins v Lilly & Co.* (116 Wis2d 166). Deciding the identification issue without the benefit of the extensive California litigation over market shares, the Wisconsin court held that it was prevented from following *Sindell* due to "the practical difficulty of defining and proving market share" (*id.* at 189). Instead of focusing on tying liability closely to the odds of actual causation, as the *Sindell* court attempted, the *Collins* court took a broader perspective, and held that each defendant is liable in proportion to the amount of risk it created that the plaintiff would be injured by DES. Under the *Collins* structure, the "risk" each defendant is liable for is a question of fact in each case, with market shares being relevant to this determination (*id.* at 191, 200). Defendants are allowed, however, to exculpate themselves by showing that their product could not have caused the injury to the particular plaintiff (*id.* at 198).

The Washington Supreme Court, writing soon after *Collins v Lilly & Co.*, took yet another approach (*see, Martin v Abbott Labs*, 102 Wash2d 581). The Martin court first rejected the *Sindell* market share theory due to the belief (which later proved to be erroneous in *Brown v Superior Court* [*supra*]) that California's approach distorted liability by inflating market shares to ensure plaintiffs of full recovery (*id.* at 601). The *Martin* court instead adopted what it termed "market share alternative liability," justified, it concluded, because "[e]ach defendant contributed to the risk of injury to the public, and consequently, the risk to individual plaintiffs" (*id.* at 604).

Under the Washington scheme, defendants are first allowed to exculpate themselves by proving by the preponderance of the evidence that they were not the

manufacturer of the DES that injured plaintiff. Unexculpated defendants are presumed to have equal market shares, totalling 100%. Each defendant then has the opportunity to rebut this presumption by showing that its actual market share was less than presumed. If any defendants succeed in rebutting this presumption, the liability shares of the remaining defendants who could not prove their actual market share are inflated, so that the plaintiff received a 100% recovery (*id.* at 605-606).[1] The market shares of defendants is a question of fact in each case, and the relevant market can be a particular pharmacy, or county, or state, or even the country, depending upon the circumstances the case presents (*George v Parke-Davis, supra*).

Turning to the structure to be adopted in New York, we heed both the lessons learned through experience in other jurisdictions and the realities of the mass litigation of DES claims in this State. Balancing these considerations, we are led to the conclusion that a market share theory, based upon a national market, provides the best solution. As California discovered, the reliable

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[1]The actual operation of this theory proved more mathematically complex when the court was presented with the question of what to do about unavailable defendants. Recognizing that the possibility of abuse existed when defendants implead unavailable defendants, who would then be assumed to have had an equal share of the market, the court placed the burden upon appearing defendants to prove the market share of the absent ones (*George v Parke-Davis*, 107 Wash2d 584). If this can be proved, the plaintiff simply cannot recover the amount attributable to the absent defendant, and thus recovery in the case is less than 100%. If the market share of the absent defendant cannot be shown, the remaining defendants who cannot proved their market shares have their shares inflated to provide plaintiff with full recovery. Finally, if all appearing defendants can prove their market shares, their shares are never inflated, regardless of whether the market share of a non-appearing defendant can be proved or not; thus, in this situation, the plaintiff again will not recover her full damages (*id.*).

determination of any market smaller than the national one likely is not practicable. Moreover, even if it were possible, of the hundreds of cases in the New York courts, without a doubt there are many in which the DES that allegedly caused injury was ingested in another State. Among the thorny issues this could present, perhaps the most daunting is the specter that the particular case could require the establishment of a separate market share matrix. We feel that this is an unfair, and perhaps impossible burden to routinely place upon the litigants in individual cases.

Nor do we believe that the Wisconsin approach of assessing the "risk" each defendant caused a particular plaintiff, to be litigated anew as a question of fact in each case, is the best solution for this State. Applied on a limited scale this theory may be feasible, and certainly is the most refined approach by allowing a more thorough consideration of how each defendant's actions threatened the plaintiff. We are wary, however, of setting loose, for application in the hundreds of cases pending in this State, a theory which requires the factfinder's individualized and open-ended assessment of the relative liabilities of scores of defendants in every case. Instead, it is our perception that the injustices arising from delayed recoveries and inconsistent results which this theory may produce in this State outweigh arguments calling for its adoption.

Consequently, for essentially practical reasons, we adopt a market share theory using a national market. We are aware that that [sic] the adoption of a national market will likely result in a disproportion between the liability of individual manufacturers and the actual injuries each manufacturer caused in this State. Thus our market share theory cannot be founded upon the belief that, over the run of cases, liability will

approximate causation in this State (*see, Sindell v Abbott Labs, supra* at 612). Nor does the use of a national market provide a reasonable link between liability and the risk created by a defendant to a particular plaintiff (see, Collins v Lilly & Co. *supra*; Martin v Abbot Labs, *supra*). Instead, we choose to apportion liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public at large. Use of a national market is a fair method, we believe, of apportioning defendants' liabilities according to their total culpability in marketing DES for use during pregnancy. Under the circumstances, this is an equitable way to provide plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants.

To be sure, a defendant cannot participate in the marketing of DES for pregnancy use; if a DES producer satisfies its burden of proof of showing that it was not a member of the market of DES sold for pregnancy use, disallowing exculpation would be unfair and unjust. Nevertheless, because liability here is based on the overall risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.[2]

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[2]Various defendants argue here that although they produced DES, it was not sold for pregnancy use. If a defendant was not a member of the national market of DES marketed for pregnancy, it is not

Finally, we hold that the liability of DES producers is several only, and should not be inflated when all participants in the market are not before the court in a particular case. We understand that, as a practical matter, this will prevent some plaintiffs from recovering 100% of their damages. However, we eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liability beyond its fair share of responsibility.[3]

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culpable, and should not be liable. Consequently, if a particular defendant sold DES in a form unsuitable for use during pregnancy, or if a defendant establishes that its product was not marketed for pregnancy use, there should be no liability. From the record before the Court here, however, the facts are not developed well enough to establish that any defendants were not in the national market of DES sold for pregnancy use. Thus summary judgment cannot at this time be granted on this issue as to any defendants.

[3]The dissenter misapprehends the basis for liability here. We have not by the backdoor adopted a theory of concerted action. We avoided extending this theory, because its concomitant requirement of joint and several liability expands the burden on small manufactuers beyond a rational or fair limit. This result is reached by the dissent, not by the majority, so that criticism on this front is misplaced.

We are confronted here with an unprecedented identification problem, and have provided a solution that rationally apportions liability. We have heeded the practical lessons learned by other jurisdictions, resulting in our adoption of a national market theory with full knowledge that it concedes the lack of a logical link between liability and causation in a single case. The dissent ignores these lessons, and, endeavoring to articulate a theory it perceives to be closer to traditional law, sets out a construct in which liability is based upon chance, not upon the fair assessment of the acts of defendants. Under the dissent's theory, a manufacturer with a large market share may avoid liability in many cases just because it manufactured a memorably shaped pill. Conversely, a small manufacturer can be held jointly liable for the full amount of every DES injury in this State simply because the shape of its product

III.

The constitutionality of the revival statute remains to be considered (*see*, L 1986, ch 682, §4). This section revives, for the period of one year, actions for damages caused by the latent effects of DES, tungsten carbide, asbestos, chlordane, and polyvinylchloride. Defendants argue that the revival of barred DES claims was unconstitutional as a denial of both due process and equal protection, under the State and Federal Constitutions (*see* NY Const art 1, §§6, 11; US Const, 14th Amend, §1). We are concerned here only with the constitutionality of the statute as it pertains to DES; there are no producers of the other substances, or plaintiffs alleging injury therefrom, before the Court on these appeals.

The federal due process clause provides very little barrier to a state legislature's revival of time-barred actions (*see, Chase Securities Corp v Donaldson*, 325 US 304). In Chase, the United States Supreme Court upheld the revival of a time barred action, stating that statutes of limitation "represent a public policy about the privilege to litigate * * * the history of pleas shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control" (*id.* at 314). Under state law, the level of review seems

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was not remarkable, even though the odds, realistically, are exceedingly long that the small manufacturer caused the injury in any one particular case.

Therefore, although the dissent's theory based upon a "shifting the burden of proof" and joint and several liability is facially reminiscent of prior law, in the case of DES it is nothing more than advocating that bare fortuity be the test for liability. When faced with the novel identification problem posed by DES cases, it is preferable to adopt a new theory that apportions fault rationally, rather than to contort extant doctrines beyond the point at which they provide a sound premise for determining liability.

somewhat more stringent. In *Gallewski v Hentz* (301 NY 164, 174) the Court stated that "the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the Court that serious injustice would result to plaintiffs not guilty of any fault if the intentions of the Legislature were not effected." It appears, however, that we have applied a less strict test in other cases, and have been satisfied if there was an apparent injustice which "calls for a remedy," and which is "reasonable" and not "arbitrary." (*Robinson v Robbins Dry Dock & Repair Co.*, 238 NY 271, 279-280).

We need not light upon a precise test here, however, because the Legislature's revival of DES claims meets the highest standard. For at least 25 years this Court maintained an exposure rule for toxic substances, because it was felt that change in this area was the responsibility of the Legislature (*see, e.g., Schwartz v Heyden Newport*, 12 NY2d 212, 220; *Fleishman v Lilly & Co., supra* at 890). Indeed, in *Fleishman v Lilly & Co.* (*supra*) the Legislature's attention was drawn specifically to DES by the majority, which stated that any change in the exposure rule was the Legislature's role.

The Legislature has now revived DES actions that were time barred under the exposure rule, while also instituting a discovery rule for future application (L 1986, ch 682, §4; CPLR 214-c). The latent nature of DES injuries is well known, and it is clear that in the past the exposure rule prevented the bringing of timely actions for recovery. Thus we believe that exceptional circumstances are presented, that an injustice has been rectified, and that the requirements of *Gallewski v Hentz* (*supra*) have been met.

Defendants argue further that, even if the statute is generally valid, it may be unconstitutionally applied in cases in which the plaintiff could have sued originally, but did not. It does seem that some plaintiffs may have known of their injuries a day, or a week, a month, or perhaps longer, before the original limitations period ran. Some may have known of their exposure, but did not develop injuries during the limitations period. Others may have known of some effect upon them of DES exposure, which became cancerous only after any action would have been time barred. Under these circumstances, the Legislature properly determined that it would be more fair for all plaintiffs to uniformly now have one year to bring their actions, rather than for the courts to begin drawing arbitrary lines transecting this area's shades of gray.

Defendants also argue that the revival statute violates equal protection, because the Legislature designated only five substances for revival, including DES, while instituting a prospective only discovery rule for other substances. Defendants claim that this categorization is without sufficient basis, and that it is the result of a "political compromise." But most, if not all legislation is the product of some compromise, so that this objection surely is no basis for finding the revival statute unconstitutional. Instead, here we must proceed on the presumption that the law is constitutional, and will hold otherwise only if it is established that the distinction drawn has no reasonable basis (*Trump v Chu*, 62 NY2d 20; *Montgomery v Daniels*, 38 NY2d 41, 61). Moreover, because defendants allege no impairment of a fundamental right, the Legislature has substantial leeway in making classifications in this area of "economics and social welfare" (*see, Montgomery v Daniels, supra*, [*quoting Dandridge v Williams*, 397 US 471, 485]).

As it pertains to DES, surely the revival statute has a rational basis, and the Legislature acted within its broad range of discretion in enacting the law. The number of DES-caused injuries was relatively well known by the Legislature, which allowed for the ramifications of revival of DES claims, such as the effect on insurance interests, and the other costs, to be reasonably predicted (Record of Proceedings, New York Assembly [June 24, 1986][statement of Assemblyman M. H. Miller]). Furthermore, it was also well known, particularly after *Fleishman v Lilly* (*supra*), that DES victims were prejudiced under current law. This, we believe, is enough of a basis for the Legislature to revive DES claims now, and wait as to other substances until it is felt that these substances present a problem suitable for resolution. The Legislature does not violate equal protection by providing a rational piecemeal remedy for what may be a larger problem (*Williamson v Lee Optical*, 348 US 483).

Accordingly, in each case the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Hymowitz v Eli Lilly - Case No. 56
Tigue v E.R. Squibb - Case No. 57
Dolan v Eli Lilly - Case No. 58
Hanfling v Eli Lilly - Case No. 59

MOLLEN, J. (concurring in *Hymowitz* and *Hanfling*; and dissenting in part in *Tigue* and *Dolan*):

The issue presented to the Court in this appeal is to determine whether the revival statute for DES claims is constitutional and has properly "opened the window" to enable injured parties to recover for their injuries caused by DES and, if so, how to best enable such plaintiffs to overcome the practical impossibility of

bearing their normal burden of proof of demonstrating that the defendants caused their injuries. The majority has selected one approach to meet this issue. However, I am compelled to concur in part and dissent in part because I am convinced that another more appropriate method of approaching this issue is fairer and more just and equitable to the plaitniffs and to those defendants who could not have caused the plaintiff's injuries, and which is consistent with established principles of tort law. I concur with the majority's conclusion that the revival statute is, in all respects, constitutional and may be relied upon by the plaintiffs herein. I am also in complete agreement with the majority's view that the market share theory of liability, based upon a national market, is an appropriate means by which to accord DES plaintiffs an opportunity to seek recovery for their injuries. However, I respectfully disagree with the majority's conclusion that there should be no exculpation of those defendants who produced and marketed DES for pregnancy purposes, but who produced and marketed DES for pregnancy purposes, but who can prove, by a preponderance of the evidence, that they did not produce or market the particular pill ingested by the plaintiff's mother. Moreover, in order to ensure that these plaintiffs receive full recovery of their damages, as they are properly entitled to by any fair standard, I would retain the principle of imposing joint and several liability upon those defendants which cannot exculpate themselves.

The emergence of the market share concept of liability in the field of products liability reflects a recognition by several jurisdictions throughout the United States that due to the incidence of mass production and marketing of various drugs and fungible goods, consumers are many times harmed by a product which

is not easily traceable to a specific manufacturer, particularly in those situations where the harm occurred many years prior to the discovery of the injuries and the cause thereof. Such is the situation in the DES cases now before us. Under traditional common law tort principles, a plaintiff is required to establish the existence of a causal relationship between the act or omission of the defendant or defendants and the injury sustained (*see, Morrissey v Conservative Gas Corp.*, 1 NY2d 741; Prosser & Keeton, Torts § 41, at 262). However, given the reality of the situation in DES cases, including the lengthy passage of time, the generic form of most DES pills and the unavailability of pharmaceutical and physician records, it is, as a practical matter, impossible for most DES plaintiffs to bear the burden of proof of establishing the traditional tort element of causation.

Moreover, as noted by the majority, the tort doctrines of alternative liability and concerted action, both of which provide for recovery in situations where a plaintiff, through no fault of his or her own, cannot identify the actual wrongdoer, do not provide appropriate relief to these DES plaintiffs. Unlike the scenario present in the DES cases, the principle of alternative liability presupposes that the number of possible wrongdoers are few in number, that one of the joined defendants had to have actually caused the plaintiff's injury and that the defendants are in a much better position than the plaintiff to identify the actual wrongdoer and, therefore, the burden is shifted to the defendants to prove who was the actual wrongdoer and who among them are to be exculpated (*see, Summers v Tice*, 33 Cal2d 80; Restatement [Second] of Torts 433B[3]). However, in view of the difference in the factual circumstances, the theory of alternative liability does not provide a workable solution for DES plaintiffs.

The concept of concerted action liability requires, *inter alia*, that the plaintiff prove that all of the joined defendants had an understanding, expressed or implied, to participate in a common plan or design to commit a tortious act or to lend assistance to the wrongdoer (*see*, Prosser & Keeton, Torts § 46, at 323). Typically, DES plaintiffs allege that the concerted action of the DES manufacturers consisted of using one another's marketing techniques, relying upon each other's testing and encouraging one another to market DES without performing adequate testing or warnings. The courts, with few exceptions (*see, e.g., Abel v Lilly & Co.*, 418 Mich. 311), have rejected the applicability of concerted action liability to DES cases because the plaintiffs cannot establish the existence of an express or tacit agreement among DES manufacturers to market or produce DES without proper testing or warnings (*see, e.g., Sindell v Abbott Labs*, 26 Cal3d 588, *cert denied* 499 US 912; *Martin v Abbott Labs*, 102 Wash2d 581; *Collins v Lilly & Co.*, 116 Wis2d 166). The parallel or imitative conduct of DES manufacturers in producing and/or marketing DES, as the majority expressly notes, is insufficient, in and of itself, to establish concerted action liability (slip opinion, p 12).

The principle of market share litigation was first espoused by the California Supreme Court in *Sindell v Abbott Labs* (*supra*), as a valid theory of manufacturer's liability based upon each manufacturer's share of the market. This approach provides DES plaintiffs with a means by which to recover damages for their injuries without the plaintiffs being held to the traditional tort requirement of identifying the actual wrongdoer. The public policy underpinnings of the *Sindell* rationale is that, from a perspective of fairness and equity, the DES manufacturers are in a better position than the

innocent plaintiffs who have sustained grievous injuries to bear the cost of such injuries. Thus, the *Sindell* court held that once a plaintiff has joined a "substantial share" of the DES manufacturers of the relevant market in the action and has established that the sustained injuries were caused by the ingestion of DES by the plaintiff's mother during pregnancy, the burden of proof shifts to each defendant to demonstrate, by a preponderance of the evidence, that it did not produce or market the pill ingested by the plaintiff's mother. Those DES defendants who could not exculpate themselves, would then be liable for the proportion of the judgment which represented its share of the market. The intended result of the *Sindell* approach is that, "each manufacturer's liability for an [particularly DES] injury would be approximately equivalent to the damage caused by the DES it manufactured" (*supra*, p 613).

The Wisconsin and Washington Supreme Courts subsequently adopted collective liability theories in DES cases based upon similar policy considerations; namely, as between the injured plaintiffs and the negligent defendants, the latter should bear the cost of injury (*Collins v Lilly Co.*[sic], 116 Wis2d 166, *supra*; *Martin v Abbott Labs*, 102 Wash2d 581, *supra*). Both the Collins and Martin courts reasoned that since all of the DES manufacturers and distributors contributed to the risk of injury to the public and, consequently, the risk of injury to individual plaintiffs, each defendant shared, in some measure, a degree of culpability in producing or marketing DES. In *Collins*, the Wisconsin Supreme adopted a "risk contribution" theory of liability, and, in *Martin*, the Washington Supreme Court adopted what it termed a "market share alternative liability" theory. These two approaches differ from the *Sindell* theory primarily in the manner in which the damages are

apportioned. Significantly, both the Supreme Courts of Wisconsin and Washington in the *Collins* and *Martin* cases, as did the Supreme Court of California in *Sindell*, provided that the joined or impleaded defendants may exculpate themselves from liability if they can establish, by a preponderance of the evidence, that they did not produce or market the particular DES pill taken by the plaintiff's mother. Notably, in *Collins*, the Wisconsin Supreme Court explained that it would not adopt a risk contribution theory which would have imposed liability solely upon the DES defendants' participation in the creation of the risk of injury even though some of the defendants could establish that they could not have actually caused the plaintiff's injury. The *Collin's* court noted, "(w)e still require it be shown that the defendant drug company reasonably could have contributed in some way to the actual injury" (*supra*, p 191, n 10). In fact, none of the jurisdictions which have adopted varying theories of collective liability in DES cases, has refused to permit exculpation of those defendants which have been able to prove that they could not have produced or marketed the pill which caused the particular plaintiff's injuries, thereby recognizing that to preclude exculpation would directly and unnecessarily contravene the established common law tort principles of causation (*see, Sindell v Abbott Labs, supra; Collins v Lilly & Co., supra; Martin v Abbott Labs, supra; Abel v Eli Lilly Co., supra; McCormack v Eli Lilly & Co., supra; see also, Burnside v Abbott Labs*, 351 Pa S 264).

Clearly, the development and underlying purpose of the various concepts of liability in DES cases has been to provide a means whereby the plaintiffs, who cannot identify the actual manufacturer of the pill ingested by their mother, are alleviated of the traditional burden

of proof of causation and to shift that burden to the defendants. The various theories of collective liability which have been adopted in the several jurisdictions in an effort to provide plaintiffs with a means to recovery for their injuries, were not intended to, and did not, provide DES plaintiffs with an unprecedented strict liability cause of action. However, the majority herein, by precluding exculpation of those defendants in DES cases who produced DES for pregnancy purposes but who can establish, by a preponderance of the evidence, that they did not and could not have produced or marketed the pill which caused the plaintiff's injuries, has created such a radical concept and purports to limit it to DES claims. In the majority's view, the defendant's liability in DES cases is premised upon the overall risk of injury which they created to the public at large in producing and marketing DES for pregnancy purpose and, therefore, exculpation of those defendants who can establish that the plaintiff's mother did not ingest their pill, would be inconsistent with the overall risk theory of liability. By taking this view, however, the majority, while stating that it is adopting a market share theory of liability, is, in essence, despite its disclaimer of doing so, adopting a concerted action theory of liability, but has eliminated therefrom the requirement that the plaintiffs establish that the defendants tacitly agreed to produce and market DES for pregnancy use without proper testing and without adequate warnings of the potential dangers involved. Such a result, represents a radical departure from fundamental tenets of tort law and is unnecessarily unfair and inequitable to the defendants who have proven, or can prove, that they did not produce the pill which caused the injury. Moreover, this result is directly contrary to the majority's own statement that it is rejecting the "conscious

parallelism" theory utilized in *Bichler v Eli Lilly & Co.* (79 AD2d 317, *affd* 55 NY2d 571), because, as stated by the majority herein, "(p)arallel behavior, the major justification for visiting liability by the product of one manufacturer upon the head of another under this analysis, is a common occurrence in industry generally. We believe, therefore, that inferring agreement from the act of parallel activity alone improperly expands the concept of concerted action beyond a rational or fair limit; among other things, it potentially renders small manufacturers in the case of DES and in countless other industries, jointly liable for all the damages stemming from the defective products of an entire industry" (slip opinion, p 12).

I fully concur with the above stated position of the majority and thus, I cannot agree that the imposition of liability on drug companies, in this case DES manufacturers, solely upon their contribution, in some measure, to the risk of injury by producing and marketing a defective drug, without any consideration given to whether the defendant drug companies actually caused the plaintiff's injuries, is appropriate or warranted. Rather, I would adopt a market share theory of liability, based upon a national market, which would provide for the shifting of the burden of proof on the issue of causation to the defendants and would impose liability upon all of the defendants who produced and marketed DES for pregnancy purposes, except those who were able to prove that their product could not have caused the injury. Under this approach, DES plaintiffs, who are unable to identify the actual manufacturer of the pill ingested by their mother, would only be required to establish, (1) that the plaintiff's mother ingested DES during pregnancy; (2) that the plaintiff's injuries were caused by DES; and (3) that

the defendant or defendants produced and marketed DES for pregnancy purposes. Thereafter, the burden of proof would shift to the defendants to exculpate themselves by establishing, by a preponderance of the evidence, that the plaintiff's mother could not have ingested their particular pill. Of those defendants who are unable to exculpate themselves from liability, their respective share of the plaintiff's damages would be measured by their share of the national market of DES produced and marketed for pregnancy purposes during the period in question.

I would further note that while, on the one hand, the majority would not permit defendants who produced DES for pregnancy purposes to exculpate themselves, the majority at the same time deprives the plaintiffs of the opportunity to recover fully for their injuries by limiting the defendants' liability for the plaintiff's damages to several liability. In my view, the liability for the plaintiff's damages of those defendants who are unable to exculpate themselves should be joint and several thereby ensuring that the plaintiffs will receive full recovery of their damages. In addition to being fair to the DES plaintiffs, the imposition of joint and several liability is consistent with that portion of the revival statute which specifically exempted DES claims from those provisions which provide, with certain exceptions, for several liability of joint tortfeasors (*see*, L. 1986, ch. 682, § 12; CPLR 1600 *et seq.*). Moreover, in order to ease the financial burden on the specific defendants named in the lawsuit, the defendants would have the option of seeking contribution from their fellow defendants for damages in excess of each defendant's particular market share, and a defendant should be permitted leave to implead those DES manufacturers who the plaintiff has not joined, in order to ensure,

where possible, full contribution (*see, e.g., Dole v Dow Chemical Co.*, 30 NY2d 143). Admittedly, adherence to joint and several liability could result in disproportion between a defendant's potential liability for the damages suffered by the plaintiff and defendant's actual national market share; however, the opportunity to present exculpatory evidence reduces the risk of imposing liability on innocent defendants.

The application of the aforesaid principles, although somewhat innovative and a modification of traditional tort law, (i.e., the burden of proof is on the plaintiff to prove proximate causation) would, in view of the exigent circumstances, be in furtherance of a valid public policy of imposing the burden of bearing the cost of severe injuries upon those who are responsible for placing into the stream of commerce the causative instrumentality of such injuries. Adherence to this principle would not be too dissimilar from the accepted doctrine of *res ipsa loquitor* which provides, in essence, that where an instrumentality which caused the plaintiff's injuries was in the exclusive control of the defendant and the accident which occurred is one which would not ordinarily happen without negligence, these facts are sufficient to justify an inference of negligence and to shift the burden upon the defendant of coming forward with an explanation (*see, e.g., Galbraith v Busch*, 267 NY 230, 234; Richardson, Evidence § 93, p 68 [Prince 10th ed]). Thus, this approach, unlike that taken by the majority, does not represent an unnecessary and radical departure from basic principles of tort law. By characterizing this approach as "nothing more than advocating that bare fortuity be the test for liability" (slip opinion p 19, n 3) the majority fails to perceive that this is no more and no less than a basic principle of tort law; i.e., a plaintiff may not recover for his injuries from a defendant who

could not have caused those injuries. When the majority eliminates this fundamental causative factor as a basis for recovery, it effectively indulges in the act of judicial legislating. I would further note that if the Legislature had intended to adopt this radical approach which is at total variance with traditional tort law, it could readily have done so when it enacted the revival statute for, among others, DES plaintiffs. Its refusal to do so can certainly not be deemed to be an invitation to this Court to assume the legislative role.

Judged by the aforesaid standard, I conclude that the trial courts' orders in *Tigue & Margolies v E.R. Squibb* (Case No. 57) and *Dolan v Eli Lilly* (Case No. 58), to the extent that they denied the summary judgment motions of the defendant The Upjohn Company ("Upjohn") in both actions and the defendant Rexall Drug Company ("Rexall") in the *Tigue* action, were improper. In *Tigue*, Mrs. Tigue, the plaintiff's mother, testified that the DES pill she ingested while she was pregnant with the plaintiff was a white, round tablet (R 709-710). Similarly, Myrna Margolies' mother testified that the DES pill she ingested was a dark red, hard, round pill (R 224-226). Mr. Margolies, the plaintiff's father, also recalled that the pills were a reddish color and Mrs. Margolies' obstetrician stated that the DES pill he prescribed to his patients was not an Upjohn product. Moreover, in the *Dolan,* action, Mrs. Dolan, the plaintiff's mother, stated that the DES pill she took was a white, round, hard tablet (R 321; 303). This fact was corroborated by Mr. Dolan's testimony (R 414; 444). Finally, it was established that Upjohn's DES pill which was produced and marketed for pregnancy purposes, was in the form of a "perle" which is a pharmaceutical term for a dose form consisting of a soft elastic capsule

containing a liquid center (R 2182). Based on the evidence submitted in support of Upjohn's summary judgment motions in these two cases, I would conclude that the plaintiffs have failed to adduce sufficient proof in admissible form to raise a triable issue of fact as to whether their mothers ingested an Upjohn DES pill. Accordingly, Upjohn's motion for summary judgment in those actions should have been granted.

Additionally, in *Tigue & Margolies v E.R. Squibb* (Case No. 57), Rexall's motion for summary judgment should have been granted since the plaintiffs failed to raise a triable issue of fact as to whether their mothers could have ingested a Rexall DES product during the pregnancies in question. The evidence submitted in support of Rexall's motion established that until 1978, Rexall sold its products, including its DES pill, *exclusively* to Rexall Drug Stores (R 1934, 22003-04; 2210). The testimony of the plaintiffs' parents, Mrs. Tigue and Mr. and Mrs. Margolies established that they had purchased their DES prescriptions from non-Rexall pharmacies during the periods of their respective pregnancies, i.e., 1960 and 1953. Based on this uncontroverted evidence demonstrating Rexall's non-involvement in these plaitniffs' injuries, Rexall's motion for summary judgment should have been granted.

As to those defendants which seek to exculpate themselves from liability in these various actions based upon the fact that they produced and marketed DES solely for non-pregnancy purposes, we agree with the majority's conclusion that the record before the Court is factually insufficient to establish that they were not in the national market of DES sold for pregnancy use (see, slip opinion, p 18, n 2). Accordingly, their summary judgment motions were properly denied.

* * * * * * * * * * * * * * * * * * * *

In Case Nos. 56 and 59: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Wachtler. Judges Alexander, Titone and Hancock concur. Judge Mollen concurs in a separate opinion. Judges Simons, Kaye and Bellacosa took no part.

In Case Nos. 57 and 58: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Wachtler. Judges Alexander, Tine and Hancock concur. Judge Mollen dissents in part and votes to modify in an opinion. Judges Simons, Kaye and Bellacosa took no part.

Decided April 4, 1989

APPENDIX B

Appellate Division Order
(April 14, 1988)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 14, 1988

Present-Hon. Theordore R. Kupferman, **Justice Presiding**
Sidney H. Asch
Ernst H. Rosenberger
Betty Weinberg Ellerin
George Bundy Smith, **Justices.**

.....x

Mindy Hymowitz,

Plaintiff-Respondent,

-against-

Eli Lilly and Company, Abbott Laboratories, The Upjohn Company and E. R. Squibb & Sons, Inc.,

Defendants-Appellants. 31981

-and-

Merck & Co., Inc., Ayerst Laboratories, a division of American Home Products Corp., and Winthrop Laboratories, a division of Sterling Drug, Inc.,

Defendants,

Attorney General of the State of New York,
Intervenor-Respondent

.....x

An appeal having been taken to this Court by the defendants-appellants from an order of the Supreme Court, New York County (Ira Gammerman, J.), entered on July 21, 1987,

And said appeal having been argued by Roy G. Weatherup of counsel for appellant E.R. Squibb & Sons, Inc., by Russel H. Beatie, Jr. of counsel for appellant Eli Lilly and Company, by Robin J. Stout of counsel for appellant The Upjohn Company, by Karl E. Seib, Jr. of counsel for appellant Abbott Laboratories, by Paul D. Rheingold of counsel for respondent, by Andrea Green of counsel for intervenor-respondent, and a brief as amicus curiae having been submitted by Joseph M. Costello on behalf of All Putter Company, Inc.; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same hereby is affirmed for the reasons stated by Ira Gammerman, J., without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS

Clerk.

APPENDIX C

Appellate Division Order and Opinion
(April 14, 1988)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 14, 1988

Present-Hon. Theordore R. Kupferman, Justice Presiding
Sidney H. Asch
Ernst H. Rosenberger
Betty Weinberg Ellerin
George Bundy Smith, Justices.

Elizabeth Tigue, Barbara Tigue, Sayre Margolies, as Administratrix of the Estate of Myrna Margolies,

Plaintiffs-Respondents,

-against-

E.R.Squibb & Sons, Inc., Abbott Laboratories, Boyle & Company Pharmaceuticals, Merck Sharp & Dohme, a Division of Merck & Co., Inc., Rexall Drug Company, William H. Rorer, Inc. and The Upjohn Company,

Defendants-Appellants,

Amfre-Grant Inc., a Subsidiary of Ormont Drug & Chemical Co., Inc., Carnrick Laboratories, a Division of G.W.Carnrick Co., Cole Pharmacal Company, Inc., Kremers-Urban Company, and Jerome Schneider, M.D.

Defendants.

31980

An appeal having been taken to this Court by the defendants-appellants from an order of the Supreme Court, New York County (Ira Gammerman, J.), entered

on July 23, 1987, which denied appellants' motions, pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs' complaint.

And said appeal having been argued by John L. McGoldrick of counsel for appellant Abbott Laboratories, by A.Edward Grashof of counsel for appellant Rexall Drug Company, by Jay P. Mayesh of counsel for appellant The Upjohn Company, by William K.Dodds of counsel for appellant Boyle & Company Pharmaceuticals, by Joseph DiBenedetto of counsel for appellant Rorer Pharmaceutical Corp., f/k/a William H. Rorer, Inc., by Roy G. Weatherup of counsel for appellant E.R.Squibb & Sons, Inc., by Theodore V.H. Mayer of counsel for appellant Merck Sharp & Dohme, a Division of Merck & Co., Inc., and by Paul D. Rheingold of counsel for respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the order so appealed from be and the same hereby is affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Kupferman, J.P., Asch, Rosengerger, Ellerin, Smith, JJ.

31980 Elizabeth Tigue, et al.,
Plaintiffs-Respondents, P.D. Rheingold

-against-

E.R. Squibb & Sons, Inc., et al.,

Defendants-Appellants,

J.L.McGoldrick
A.E.Grashof
J.P.Mayesh
W.K.Dodds
J.DiBenedetto
R.G.Weatherup
T.V.H.Mayer

Amfre-Grant Inc., etc., et al.,
Defendants.

Order, Supreme Court, New York County (Ira Gammerman, J.), entered July 23, 1987, denying the motions of defendants Rexall, Upjohn and Abbott, pursuant to CPLR 3212, for summary judgment dismissing the plaintiffs' complaints, unanimously affirmed, without costs.

Seven drug manufacturers appeal from a well-reasoned determination which denied exculpation based on their claim that they were not the manufacturer of the drug known as diethlystilbestrol (DES), allegedly ingested by the mothers of the plaintiffs. The history of DES is well documented in a previous opinion of this court, *Bichler v Eli Lilly and Co.*, 79 AD2d 317.

The underlying problem presented is which of the many manufacturers of this unpatented drug should be held culpable, where it cannot be definitively determined which company manufactured the pills ingested by the plaintiffs' mothers.

In the 1987 cumulative supplement to his treatise, 1 NY Products Liability Sec. § 107, Michael Weinberger succinctly analyzes the present state of the law under the heading "Enterprise Liability":

In Bichler v. Eli Lilly & Co.,* the Court of Appeals affirmed a plaintiff's verdict, which was based on a concerted action theory. However, the Court did not decide the validity of a cause of action based on concerted action in DES cases. The court stated that because defendant did not object to the trial court's instructions on concerted action, this theory became the law of the case, and was not preserved for appellate review. Hence, the court took no position on the question of whether New York recognizes a cause of action based on concerted action.

In a later related DES case, the Court of Appeals again took no position on whether the theory of concerted action (or other related theories) should be adopted in DES cases. The court held only that the Bichler jury finding of concerted action was not entitled to collateral estoppel effect, because the issue of concerted action was not actually contested in the trial judge's jury charge in the earlier case.** Therefore, New York still has no position on whether a cause of action in DES cases can be based on concerted action.

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* 9.50 Bichler v. Eli Lilly & Co., 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982)

** 9.60 Kaufman v. Eli Lilly & Co., 65 NY2d 449, 492 NYS2d 584, 482 NE2d 63 (1985).

As noted by Justice Gammerman, the law in this Department clearly recognizes the concerted action theory. *Bichler v. Eli Lilly & Co., supra*, 79 AD2d at 328-29. There is, however, still a question of whether exculpation is available to those drug manufacturers who can clearly establish that they could not have been the purveyor of the drug to a particular plaintiff, which question is also significant in the many other DES cases presently pending in the courts. For example, it was testified that hard, small, white tablets were ingested by Mrs. Tigue. It is contended that because a different colored pill was marketed, there is no liability. Another defendant contends that it sold only to its licensed franchisees and, therefore, inasmuch as the pills in question were purchased at a specific pharmacy which was not the one of its franchisees, there should be no liability. Another defendant postulates that it did not sell in the East and so could not have been the purveyor to these plaintiffs. Still another defendant contends that it did not market DES for pregnancy-related purposes.

Basic to any determination is the question of whether exculpation should be permitted at all. However, in view of the fact that the Court of Appeals has, in two instances, left the question of concerted action open, we should now permit a complete trial record to be developed, so that when the matter is finally determined, there will be no question as to the factual details.

Order filed.

APPENDIX D

Appellate Division Order
(April 14, 1988)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 14, 1988

Present—Hon. Theordore R. Kupferman, Justice Presiding
Sidney H. Asch
Ernst H. Rosenberger
Betty Weinberg Ellerin
George Bundy Smith, Justices.

Jane Dolan, et al., Plaintiffs-Respondents, -against- Eli Lilly & Company, E.R.Squibb & Sons, Inc., The Upjohn Company and Winthrop-Breon Laboratories, Defendants-Appellants. (and other actions)	31982 -83-84

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Ira Gammerman, J.), entered on or about October 14, 1987, an order of said court entered on or about October 16, 1987, and an order of said court, entered on September 29, 1987,

And said appeals having been argued by Russel H. Beatie, Jr. of counsel for appellant Eli Lilly & Company,

by Roy G. Weatherup of counsel for appellant E.R.Squibb & Sons, Inc., by Jay P. Mayesh of counsel for appellant The Upjohn Company, and by Alfred S. Julien and Herman Schmertz of counsel for respondents; and due deliberation having been thereon,

It is unanimously ordered that the three orders so appealed from be and the same hereby are affirmed, without costs and disbursements

ENTER:

HAROLD J. REYNOLDS
Clerk.

APPENDIX E

Opinion of Supreme Court, New York County
(July 16, 1987)

SUPREME COURT : NEW YORK COUNTY
IAS : PART 27

MINDY HYMOWITZ.

Plaintiffs,

-against-

ELI LILLY and COMPANY, WINTHROP LABORATORIES, a division of STERLING DRUG, INC., THE UPJOHN COMPANY, E. R. SQUIBB & SONS, and AYERST LABORATORIES, a division of AMERICAN HOME PRODUCTS, CORP.,

Defendants.

INDEX NO. 24767-86

GAMMERMAN, J.:

In this pharmaceutical product liability action, plaintiff Mindy Hymowitz alleges that she developed cancer as a result of prenatal exposure to diethylstilbestrol ("DES"), a synthetic estrogen taken by her mother in 1954 during pregnancy to prevent possible miscarriage.

Plaintiff was born on December 11, 1954. The cancerous condition for which plaintiff seeks damages allegedly appeared in 1979. Under the statute of limitations then applicable (CPLR 208, 214) plaintiff was barred from commencing suit in December, 1975 (three years after reaching the age of majority). Plaintiff brings this action, however, under the provisions of 1986 revival statute (L. 1986 ch. 682 §4).

Plaintiff moves pursuant to CPLR 3212 to strike affirmative defenses raised by some defendants challenging the constitutionality of the revival statute and alleging that the action is time barred under the statute of limitations otherwise applicable.

Defendants Eli Lilly and Co. ("Lilly") [sic] Abbott Laboratories ("Abbott") and The Upjohn Company ("Upjohn") seek summary judgment and dismissal of the complaint as barred by the statute of limitations absent the availability of the allegedly unconstitutional revival statute.

Defendant E.R. Squibb & Sons ("Squibb) opposes the relief sought by plaintiff and contends that before the issue of the constitutionality of the revival statute is determined further discovery is required on the issue of whether such extraordinary circumstances exist in this case to justify invocation of the statute which Squibb also contends is unconstitutional. (Squibb further urges that discovery is needed to determine whether plaintiff can identify the manufacturer of the DES actually taken by her mother).

The revival portion of the 1986 tort reform legislation provides that actions seeking damages for personal injury, property damage or death caused by the latent effects of exposure to five substances (DES, asbestos, tungsten-carbide, chlordane and polyvinyl-chloride) that were time barred or dismissed, as of the effective date of the statute, may be instituted " . .within one year from the effective date of this act." The statute was passed on July 1, 1986 and was signed by the Governor on July 30, 1986.

In addition to the revival provision for the five specified substances (§4), the new tort reform legislation adopted a general discovery based statute of limitations

for injuries caused by latent effects of exposure to any substance (CPLR 214-c(2)). Under subsection 2, a victim may assert a cause of action within three years from the date the injury was or should have been discovered.

The provision for revival of claims (§4) and the discovery based statute of limitations (2) were intended by the Legislature to remedy the perceived injustice caused by the application of CPLR §§214, 208, (the exposure based statute of limitations) and to provide legal recourse for injuries caused by latent effects of toxic substances. Both provisions were enacted to remedy the failure of the old statute to recognize that such injuries may not appear until years after exposure, long after the expiration of the period within which actions may be instituted.

Legislative history indicates that the five named substances were distinguished from other toxic substances (2) as a result of compromise between the Assembly (which had voted to permit revival for all toxic substances) and the Senate which wanted to limit revival. The Legislature ultimately limited revival based upon the existence of an identifiable group affected and the resulting ability to predict the future costs of such revival. The Legislature was apparently concerned that under a broader revival statute, the large number of unknown victims would create unpredictable risks and costs.

Defendants challenge the revival statute on equal protection and due process grounds, arguing that the statute is the result of an arbitrary and irrational political arrangement arrived at without rational guidelines of scientific certainity or public necessity. Defendants further argue that the legislative concern for limiting the number of potential claimants and costs is not related to the ostensible objective of the legislation, i.e. to allow

victims of latent injuries to maintain actions. Defendants contend that the revival provision must be stricken on equal protection grounds, as an underinclusive random penalty without scientific basis, on five arbitrarily chosen substances and their manufacturers. It is contended that the prior exposure statute of limitations or the new three year discovery based provision would be more than adequate for victims of the five specified substances.

Defendant Lilly urges that generally, chemical injury claims accrue at the time of exposure (here, in utero). Under the three year exposure based statute of limitations (tolled to the age of majority) claimants could bring suit until age 21. Lilly contends that most DES patients develop cancer by age 19; and therefore, their claims would not be time barred before becoming aware of their injuries.

Defendants also claim a violation of the due process clause, in that the statute constitutes an arbitrary deprivation of the substantive property right to rely upon the absence of claims. Defendants assert that dismissal (or the passage of the applicable time bar) gives rise to substantive property rights which as a general rule, may not be abrogated and that the exceptional circumstances to permit revival are not present (*see Gallewski v. H. Hentz & Co.*, 301 N.Y. 164).

Based upon the impact upon what they allege are substantive or property rights, defendants urge the applicability of strict scrutiny or an intermediate standard of review rather than a rational basis examination.

As a general rule, state statutes of limitation reviving time barred actions are not violative of due process. Statutes of limitation represent a public policy statement with respect to the privilege to litigate. "[T]he history

of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control" (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314). The expiration of the applicable time period does not eliminate a cause of action but rather, suspends the court's power to grant a remedy (*Hulbert v. Clark*, 125 N.Y. 295). In other words, statutes of limitation relate to the availability of a remedy and not to the destruction of any fundamental right.

In the past, New York courts have upheld the power of the state legislature to extend or revive time barred claims. In *Gallewski v. H. Hentz & Co.* (301 N.Y. 164, 174), the court found that a revival statute is not necessarily void as a taking of property without due process. The court stated that "[T]he legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the legislature were not effected."

In *McCann v. Walsh Construction Co.*, (282 A.D. 444, *aff'd*, 306 N.Y. 906) the court found that the legislature acted within the limits of the Constitution in extending the time period within which victims of caissons disease could seek redress. The legislature sought to remedy the injustice caused to victims of a disease which in many cases did not produce symptoms until after the period for filing Workmen's Compensation claims has passed. The court found that under the circumstances, the legislature, by extending the time within which to institute a claim, was merely complying with the simple demands of justice.

A similar due process challenge was raised by manufacturers of Agent Orange regarding the constitutionality of the recent statute extending the time within which victims of dioxin could sue in New York (CPLR 214-b). There, as here, defendants challenged the law on the round that it permitted commencement of actions already time barred under the New York statute of limitations otherwise applicable for injuries caused by toxic chemicals. In approving the proposed settlement of the Agent Orange litigation, the Court (Weinstein, J.) rejected defendants' federal and state constitutional challenges to revival of otherwise time barred claims by the New York legislature (*In Re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 [E.D.N.Y. 1984]).

Here, as in *Gallewski, McCann* and the *Agent Orange* case, the legislature, in reviving time barred causes of action, expressed the public policy of giving preference to plaintiff's privilege to litigate over defendants' protection from stale or time barred claims. The issue raised is whether there is a reasonable connection between the revival statute and the promotion of a legitimate state interest, here, health, safety and welfare (*Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 193). In examining the constitutionality of statutes generally, the court must bear in mind the strong presumption that the legislature investigated the problem it addressed and discovered the need for the legislation passed (*Matter of Taylor v. Sise*, 33 N.Y.2d 357). The court must determine: (1) whether the legislature was acting in pursuit of permissible state objectives and, if so; (2) were the means adopted reasonably related to the accomplishment of those objectives (*Montgomery v. Daniels*, 38 N.Y.2d 41, 54).

Here, the legislature acted within permissible objectives relating to health, safety and welfare by reviving causes of action based upon latent effects of exposure to toxic substances.

Where a question of what the facts establish is raised, the court should accept the opinion of the legisature *Lincoln Bldg. Assoc. v. Barr*, 1 N.Y.2d 413, 415, *app dism* 355 U.S. 12, *citing Old Dearborne Co. v. Seagram Corp.*, 299 U.S. 183, 196). In enacting the challenged statute, the legislature expressed the view that victims of the latent effects of certain toxic substances were being denied legal recourse by the automatic application of the exposure based statute of limitations often enough to justify an exception to its general application. A reasonable relationship exists between the reform and the objective of remedying the defects or inequities under the prior statute of limitations. There is considerable support for the position upon which the legislature acted: the need to provide a forum for innocent victims who might otherwise be time barred before becoming aware of their injuries. Indeed, this case is illustrative of that need. That studies or data may refute the legislative conclusions is not dispositive. As the Court of Appeals stated:

> [t]he judiciary, however is not called on to weigh the relative worth of data or arguments which may be marshaled on either side as to the wisdom of determinations made by the Legislature in the realm of policy. 'Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the

> judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance'.

(*Montgomery v. Daniels,* 38 N.Y.2d 41, 53, *quoting Chicago, Burlington & Quincy RR Co. v. McGuire,* 219 U.S. 549, 569.)

Given the substantial degree of legislative consideration to the need for the challenged tort reform, it would be inappropriate to express an opinion regarding the factual predicate for the statute, its philosophical justification or the wisdom of its enactment (*see Montgomery v. Daniels, id.* at 53). In addition, staleness of claims based on the loss of evidence over time is not of significance. Defendants have been litigating similar non-time barred DES cases for years.

Many of the same concepts relevant to the due process analysis are applicable to defendants' equal protection challenge. Defendants argue that the revival statute is underinclusive; it arbitrarily, without scientific basis singles out five substances for the additional burden of revival while excluding other toxic chemicals which cause latent injuries; it discriminates against out-of-state manufacturers; and it denies to defendant the protection of new Article 16 and the 2 discovery based statute of limitations.

Equal protection essentially requires that all persons similarly situated should be treated alike (*Plyler v. Doe,* 457 U.S. 202). As with the due process argument, the court must determine the appropriate standard of review. When social legislation relating to the public health is challenged, as here, the standard of review is rather narrow. The revival statute, contrary to defendants' contentions, does not classify on the basis of a suspect

(or quasi-suspect) class or impair a fundamental right and therefore a strict scrutiny standard is not applicable. The legislation must be upheld if the challenged classification (targeting the five substances to the exclusion of other toxic chemicals causing latent injuries) is rationally related to a legitimate state purpose (*Western & S. Ins. Co. v. Board of Equalization*, 451 U.S. 648, 657; *Trump v. Chu*, 65 N.Y.2d 20, 25).

Under the rational basis analysis, if any conceivable facts support the classification, there is no violation of the equal protection clause. A law may not be arbitrary or irrational and must be reasonably related to some "manifest evil" which need only be "reasonably apprehended." It is only as a last resort that courts will invalidate legislation as unconstitutional (*Maresca v. Cuomo*, 64 N.Y.2d 242, 250). Further, the stated purpose justifying the statute need not be its primary purpose (*McGinnis v. Royster*, 410 U.S. 263, 276) and the court may even hypothesize the motives of the legislature to discern any conceivable legitimate goal furthered by the provision being attacked (*Maresca v. Cuomo, supra*, at 251, *quoting Weinberger v. Salfi*, 422 U.S. 749, 780).

Defendants' objection to the distinctions drawn by the legislature between the five materials and other toxic substances is based partly upon the different treatment accorded the two groups under the 1986 tort reform bill. Defendants point to the traditional burden of revival and the apparent inapplicability of Article 16 to the revival section. Examination of the provision (as it relates to DES cases) and the legislative history, reveals significant reasons to justify those distinctions, based upon the perceived realities of the latent effects of exposure to the five substances, the ability to ascertain a finite group of potential claimants and consequently to predict with some accuracy the economic costs of

revival. Given the reasonable basis for the distinctions drawn by the legislature, the alleged lack of scientific precision involved in drawing the line for revival may be disregarded. Here, the statutory classification does not result in such disparate treatment as to be arbitrary, irrational or invidiously discriminatory (*see Dandridge v. Williams*, 397 U.S. 471; *see also Parker 86th Associates v. City of New York*, 93 A.D.2d, 388, 394, *aff'd* 59 N.Y.2d 986).

The legislation and the challenged classification passes constitutional muster under a rational basis test or even under the more demanding intermediate standard ("somewhere along the sliding scale between strict scrutiny. . . and rational basis" (*Montgomery v. Daniels*, 38 N.Y.2d 41, 61)). It cannot be said that the legislature acted unreasonably in selecting the five substances for special treatment. The constitution is not offended merely because the classification is not made with mathematical or scientific exactitude or because in practice it results in some inequity (*Dandridge v. Williams, supra* at 485; *Montgomery v. Daniels, supra,* at 63). In enacting reform legislation, the legislature is permitted to proceed one step at a time and to address the part of the problem that appears most serious (*Williamson v. Lee Optical Co.*, 348 U.S. 483, 489; *Montgomery v. Daniels, supra*, at 62).

Seen in its most fundamental light, defendants object to the fact that the line drawn by the legislature in enacting tort reform includes them. Whenever the legislature draws such a line some must be included, some excluded. As long as the line drawn is reasonable, the decision as to where to draw it is left to the legislature and not the judiciary (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 8; *Montgomery v. Daniels*, 38 N.Y.2d 41).

Squibb maintains that a theory of liability under which a claimant may maintain an action without identifying the particular manufacturer of the DES taken by her mother is unconstitutional. Squibb contends that under the separation of powers doctrine such a radical restructuring of traditional tort law must be left to the legislature. Based upon a mistaken belief that causation need not be shown under the challenged theories, it argues that absent causation plaintiff lacks standing and this court is powerless to provide a remedy.

Defendant's contentions lack merit and wholly fail to meet the stringent burden to establish unconstitutionality.

Accordingly, plaintiff's motion to strike the affirmative defenses challenging the revival statute as unconstitutional and alleging that this action is time barred, is granted.

Defendants' cross-motion for summary judgment dismissing the complaint as barred by the statute of limitations are denied.

This constitutes the decision and order of the court.

Dated: July 16, 1987

/S/ IRA GAMMERMAN

J.S.C.

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NEW YORK

APPENDIX F

Opinion of Supreme Court, New York County
(July 16, 1987)

SUPREME COURT : NEW YORK COUNTY
IAS : PART 27

..... x

ELIZABETH TIGUE, BARBARA TIGUE, SAYRE MARGOLIES, as Administratrix of the Estate of MYRNA MARGOLIES,

Plaintiffs,

-against-

E.R. SQUIBB & SONS, INC., ABBOTT LABORATORIES; AMFRE-GRANT, INC., a Subsidiary of ORMONT DRUG & CHEMICAL CO., INC.; BOYLE & COMPANY PHARMACEUTICALS; CARNRICK LABORATORIES, Division of G. W. CARNRICK CO.; COLE PHARMACAL COMPANY, INC.; KREMERS-URBAN COMPANY, ELI LILLY and COMPANY; MERCK SHARP & DOHME, Division of MERCK & CO., INC.; REXALL DRUG COMPANY; WILLIAM H. RORER, INC.; THE UPJOHN COMPANY, and JEROME SCHNEIDER, M.D.

INDEX NO. 3838-76

Defendants.

..... x

GAMMERMAN, J.:

Defendants Rexall Drug Company ("Rexall"), The Upjohn Company ("Upjohn") and Abbott Laboratories, ("Abbott") move pursuant to CPLR 3212 for summary judgment dismissing the complaint based upon the

conceded inability of plaintiffs to identify the particular manufacturer of the drug, diethylstilbestrol, ("DES") to which they were allegedly exposed. Defendants contend that the right to recover on collective, non-identification or concerted action theories of liability has not been established in New York and urge the court to reject adoption of such theories. Defendants further contend that if concerted action is a viable basis of liability, it should not be applicable in a DES case. The motions are consolidated for disposition.

Plaintiffs seek to recover for injuries allegedly sustained by Elizabeth Tigue and Myrna Margolies (now deceased) as a result of the ingestion of DES by their mothers. Sayre Margolies proceeds on behalf of her daughter Myrna who died in 1977 at age 23, from clear cell adenocarcinoma of the cervix and vagina, a rare form of cancer in young women, associated with prenatal exposure to DES. Plaintiff Elizabeth Tigue was diagnosed as having vaginal adenosis, a pre-cancerous condition associated with DES exposure, in which glandular tissue normally found in the cervix is found in the vagina. Plaintiffs' complaints allege breach of warranty, negligence, strict liability, res ipsa loquitur, concerted action and aiding and abetting-strict liability.

Historical Background:

DES is a synthetic hormone that duplicates the function of estrogen, a female sex hormone naturally present in women and, in lesser amounts, in men. Estrogen is essential for female sexual development and reproduction. DES was first synthesized in 1937 by British medical researchers. The drug was never patented, and thus, could be produced and marketed in the United States by any company obtaining Food

and Drug Administration ("FDA") approval of a New Drug Application ("NDA").

By 1940 ten drug companies had filed NDAs requesting approval to produce and market DES for treatment of menopause, senile vaginitis, gonorrheal vaginitis and suppression of lactation. None of the conditions for which this initial approval was sought related to pregnancy. These filings were rejected by the FDA, it determining that the review process would be facilitated by the pooling of clinical data produced by the drug companies into a master file which would form the data base for the FDA decision. In 1941, twelve pharmaceutcial companies formed the "Small Committee"[1] to pool this clinical data for submission to the FDA. The joint clinical data was incorporated in each company's resubmitted NDA and in September, 1941, FDA approval was obtained for the use of DES. The Small Committee was thereafter disbanded.

In 1947 and 1948 a number of drug manufacturers filed supplemental NDAs for authorization to market DES, now for the treatment of certain pregnancy disorders relating to spontaneous abortion or fetal death. The dosage proposed for this treatment was many times stronger than the dosage previously approved in 1941. The supplemental applications were primarily based upon studies by two independent researches on the role of hormones in pregnancy. The researchers reported that the administration of additional estrogen in certain high

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[1]The twelve companies were: Abbott; Armour Laboratories; Ayerst, McKenna & Harrison, Ltd.; Geo. A. Breon & Co., Inc.; Charles E. Frost & Co.; Eli Lilly & Co.; Merck & Co., Inc.; Sharp & Dohme, Inc.; E.R. Squibb & Sons; Upjohn Winthrop Chemical Company; and John Wyeth & Brothers, Inc. (Affidavit of Don Charles Hines, M.D. at p. 8).

risk pregnancies appeared to reduce the risk of miscarriage. FDA approval for use of the drug in pregnancy was then given.

Lack of Product Identification:

The fundamental issue raised here (and the major problem facing these and many other plaintiffs in these DES cases) is their inability to identify the manufacturer of the DES taken by the mothers of the injured women and, thus, to directly connect the injury to a particular defendant.

The DES taken by pregnant women was produced under a chemically identical formula and usually manufactured and prescribed generically. Apparently, many drug companies cannot locate or have failed to keep records of their DES market activity. Although that market was dominated by a small number of companies, entry and exit from the market was fluid and it is estimated that between 94 and 300 pharmaceutical companies manufactured or marketed DES from 1947 to 1971.

Injuries caused by prenatal exposure to DES appear many years later. Over time, the ability of a plaintiff to identify the manufacturer is, obviously, greatly reduced. The memories or records of those who could assist in identifying the manufacturer (parents, physicians, pharmacists and drug companies) fade or disappear.

Prior Holdings:

In this state, the general rule is that a plaintiff has the burden of proof on product identification (*Morrissey v. Conservative Gas Corp.*, 285 A.D. 825 [1955], *aff'd* 1 N.Y.2d 741 [1956]). However, several non-

identification or collective liability theories have been proposed and in some cases adopted, to deal with cases in which the manufacturer of a product cannot be identified.

In *Bichler v. Lilly & Co.*, (79 A.D.2d 317 [1st Dept. 1981], *aff'd*, 55 N.Y.2d 571 [1982]), a theory of concerted action liability was the basis of recovery even though the defendant was not identified as the manufacturer of the particular DES taken by the plaintiff's mother. Indeed in *Bichler*, the jury found that the plaintiff had not established that Lilly manufactured the DES taken by her mother.

Two theories of concerted action were submitted to the jury: concerted action by implied agreement and concerted action by substantial assistance. The jury was instructed that concerted action by agreement could be inferred from evidence of consciously parallel actions, that such consciously parallel action could be the basis of a finding that the drug companies had impliedly agreed to market DES for pregnancy use without first testing the drug on pregnant mice. The trial court's charge with respect to concerted action by substantial assistance permitted the jury to find that the failure to test DES on pregnant mice by defendant Lilly substantially aided or encouraged other companies (including, presumably, the company that marketed the DES taken by plaintiff's mother) to market without appropriate testing.

The jury found that Lilly had acted in concert, that the failure to test was wrongful and that the injurious effects of DES were foreseeable. On appeal to the Appellate Division, defendant argued that the trial court's concerted action charge was erroneous, an argument that the court addressed on its merits.

The Appellate Division found sufficient evidence to support the jury's findings and, in effect, adopted the concerted action theory of liability charged by the trial court. When *Bichler* reached the Court of Appeals, a determination was made that Lilly had failed to properly except to the trial court's charge on concerted action and concerted action liability was applicable only as the law of the case. The Court concluded that there was adequate evidence to support concerted action liability by conscious parallelism or substantial assistance. The Court of Appeals (unlike the trial court and the Appellate Division) based its finding solely on events beginning in 1947 (formation of identical chemical standards, marketing DES without testing on pregnant mice, reliance upon the same studies to support supplemental NDAs) and indicated that the 1941 collaboration to secure approval for non-pregnancy use, had no bearing upon concerted action relating to the 1947 supplemental NDA for pregnancy use (*Bichler v. Lilly & Co.*, 55 N.Y.2d 571, 585, n.7).

In *Kaufman v. Lilly & Co.*, (65 N.Y.2d 449, 456, [sic] the court stated: ". .we expressed no view in *Bichler* and, express none now, on which the proposed theories-concerted action, alternative liability, enterprise liability or market share liability - if any, should be adopted in this or similar DES cases (*see, Bichler v. Lilly & Co., supra*, at p. 580, n.5). The question is still an open one in New York."

Discussion:

Defendants correctly contend that the applicability of the various "collective liability" theories (including concerted action) to DES fact patterns has not been finally ruled upon by the Court of Appeals. Nevertheless, the First Department clearly recognized and expressly

adopted the concerted action theory for DES cases (*Bichler v. Lilly & Co.*, 79 A.D.2d 317; *Kaufman v. Lilly & Co.*, 99 A.D.2d 695; *see, Carrao v. Heitler*, 117 A.D.2d 308, 313).

Since plaintiffs, at least in this Department, may proceed on a collective or concerted action liability theory, the inability to identify the actual manufacturer of the DES taken by Mrs. Tigue and Mrs. Margolies is not fatal. Plaintiffs' factual allegations to support a finding of concerted action are substantially the same as those pleaded in *Bichler* and clearly state a viable cause of action for concert by agreement or substantial assistance.

As in *Bichler,* plaintiffs contend that a finding of concert by conscious parallelism or substantial assistance may be supported based upon the formation of identical chemcial standards for DES in pregnancy, the marketing of the drug without prior testing on pregnant mice and the drug companies' reliance upon the same studies in supplemental NDAs. Plaintiffs also rely on defendants' activities leading to the FDA approval for non-pregnancy use based upon the contention that their supplemental NDAs relied upon the earlier filing. Whether the requests for approval of DES for use in pregnancy relied upon the earlier filings presents an issue of fact which cannot be determined on a motion for summary judgment. Similarly, defendant's claims that the actions by the drug companies in gaining FDA approval of DES (whether for non-pregnancy or pregnancy use) and their actions with regard to the manufacture, marketing and distribution of DES for use in pregnancy constitute concerted action sufficient to impose liability are questions for the trier of fact.

In addition, plaintiffs apparently seek to impose industry wide liability based upon wrongful failure to test and subsequent generic marketing and dispensing of DES. Plaintiffs' basic theory is that "but for the development, manufacture, distribution and sale of DES by the defendants, plaintiffs would not have suffered the injuries which they have suffered."

Plaintiffs contend that under their "but for" analysis, in addition to concert, they would be permitted to recover under various non-identification theories: enterprise liability (*Hall v. E. I. DuPont de Nemours & Co.*, 345 F.Supp. 353 [EDNY] 1972); alternative liability; market share liability (*Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132, 607 P. 2d 924) *cert. denied*, 449 U.S. 912; risk contribution (*Collins v. Eli Lilly & Co.*, 116 Wis. 166, 342 N.W.2d 37 *cert. denied*, 469 U.S. 826).

This Court declines to rule at this time on the applicability to DES cases of each of the various theories of liability (in addition to concerted action), which are not specifically pleaded but are raised in response to defendants' motions. The only question raised on the motions before this court is whether defendants may be held liable absent product identification and the answer is yes.

Claims of Exculpation:

Defendants Rexall and Upjohn contend that under any collective liability theory, a defendant who can establish that its product could not have caused plaintiff's injury may exculpate itself from liability. While exculpation may be theoretically possible (certainly under market share liability), even if the product of a particular manufacturer could be excluded a defendant may bear legal responsibility based on joint activity,

encouragement or assistance in bringing a harmful product into the stream of commerce.

Constitutional Attack:

Rexall further contends that any theory of liability (including judicially established tort doctrines) under which liability may be imposed without "causation-in-fact", presumably product identification, is unconstitutional as an excessive burden on interstate commerce and violative the due process and equal protection clauses. Further, it argues, that imposing market share and enterprise liability frustrate expressed federal policies regarding the marketing of prescription drugs and thus violate the supremacy clause.

Defendant Rexall's due process challenges are unpersuasive. Under the various theories discussed above, the requirement of traditional product identification is merely relaxed based on a finding that each defendant by its tortious behavior caused or contributed to plaintiff's injuries. Under these theories, liability may be premised upon the tortious behavior of each defendant, whose adherence to a course of conduct resulting in an unsafe standard, perpetuates the standard.

Fundamentally, imposition of liability absent product identification is based on policy grounds. As a matter of equity, the tortfeasor (who is in the best position to absorb the cost and to take the precautions) rather than the innocent victim, should bear the cost of injury. Defendants can be held responsible for wrongful conduct or omissions that result in placing a generic/fungible harmful product on the market.

Rexall's equal protection challenge amounts to no more than a fairness argument which does not rise to constitutional proportions. Equal protection is not

synonymous with absolute equality (*see Dandridge v. Williams*, 397 U.S. 471; *People v. Parker*, 41 N.Y.2d 21; *Parker 86th Associates v. City of New York*, 93 A.D.2d 388, *aff'd*, 59 N.Y.2d 986).

Rexall's federal preemption claim also lacks merit. "The criteria for determining whether there has been federal preemption are (1) the pervasiveness of the federal regulation, (2) the dominance of the federal interest, (3) the federal and state objectives to be obtained, and (4) the existence of actual conflict between the state and federal statutes, including whether the state law is an obstacle to the purposes and objectives of Congress" (*Pharmaceutical Soc. of State of New York v. Lefkowitz*, 586 F.2d 953, 958 [2d Cir., 1978]). Application of these criteria precludes a finding of federal preemption. the primary objective of the federal law is controlling product safety and efficacy (*id.*, p. 958). The objective of the proposed theories of recovery is basic fairness, to provide a remedy to the innocent victims of wrongdoers.

Rexall contends that the imposition of liability without product identification burdens interstate commerce, by increasing the cost of products, reducing availability and limiting sales by discouraging development of new drugs, and by generally increasing the cost of doing business thereby precluding entry into the pharmaceutical business.

In determining whether there is an undue burden on interstate commerce, the test is whether ". . .the burden on [interstate] commerce is clearly excessive in relation to the putative local benefits " (id at 957, *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142). Here, the local benefit is providing a forum to innocent victims of alleged wrongdoing by relaxing the traditional

product identification requirement in tort law. Clearly, a legitimate state interest is furthered. While adoption of a non-identification theory of liability could conceivably burden interstate commerce to the extent that the cost of such increased liability would be passed on to consumers through higher prices, ". . .[n]ot every exercise of local power is invalid merely because it affects in some way the flow the commerce between the States" (*Great Atlantic & Pacific Tea Co. v. Gottrell*, 424 U.S. 366, 371). Rexall has failed to demonstrate that the burden here would be clearly excessive compared to the benefit. Therefore, the commerce clause challenge also must fail.

Accordingly, defendants' motions for summary judgment dismissing the complaint are denied, and the matter is set down for trial on September 30, 1987.

Dated: July 16, 1987

/S/

J.S.C.

IRA GAMMERMAN

APPENDIX G

Order of Supreme Court, New York County
(September 23, 1987)

At an individual Assignment Part 26 of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, New York, New York on September 23, 1987.

Present:

HONORABLE IRA GAMMERMAN, Justice.

.....x

JANE DOLAN,

Plaintiff,

-against-

ELI LILLY & COMPANY, E.R. SQUIBB & SONS, INC., THE UPJOHN COMPANY, and WINTHROP-BREON LABORATORIES,

Defendants.

Index No. 23999/86 (Assigned to Justice Gammerman)

ORDER

.....x

Defendant The Upjohn Company ("Upjohn"), having moved this Court for an Order pursuant to Rule 3212 of the Civil Practice Law and Rules granting Upjohn summary judgment; and defendant E.R. Squibb & Sons, Inc. ("Squibb") having cross-moved pursuant to Rule 3212(e) of the Civil Practice Law and Rules for an Order granting partial summary judgment in favor of Squibb; and the plaintiff, by letter dated April 8, 1987, having requested leave to amend the complaint to add additional allegations to the complaint; and plaintiff's request for leave to amend the complaint having come before the

Court on June 25, 1986, and the Court having granted said request at that time,

NOW, upon reading and filing the Notice of Motion of Upjohn, dated March 2, 1987; the Affidavit of Jay P. Mayesh, Esq., sworn to March 2, 1987, and the exhibits thereto, submitted in support of Upjohn's motion; the Affirmation of William D. Fireman, Esq., dated March 25, 1987, and the Sur-Reply Affirmation of William D. Fireman, Esq., dated April 1, 1987, both submitted in opposition to Upjohn's motion; the Notice of Cross-Motion of Squibb dated March 23, 1987; the Affirmation of William D. Fireman, Esq., dated March 31, 1987, submitted in opposition to Squibb's cross-motion; the Affidavit of Sanford N. Berland, sworn to March 16, 1987, and the exhibit thereto, submitted on behalf of defendant Eli LIlly and Company; the Affirmation of William D. Fireman, Esq., dated July 6, 1987, and the exhibit thereto, submitted in opposition to Upjohn's motion and Squibb's cross-motion; and the motion and the cross-motion having duly come before the Court on July 6, 1987, and plaintiff having appeared by William D. Fireman, Esq., defendant Squibb by Charles M. McCaghey, Esq. and Debra E. Pole, Esq., defendant Upjohn by Jay P. Mayesh, Esq., and defendant Eli Lilly by Russel H. Beatie, Jr., Esq.; and due deliberation having been had thereon, and the Court having rendered a written decision dated July 16, 1987,

NOW, on motion of Stroock & Stroock & Lavan, attorneys for defendant The Upjohn Company, and on cross-motion of Olwine, Connelly, Chase, O'Donnell & Weyher, former attorneys for defendant E.R. Squibb & Sons, Inc., it is

ORDERED that Upjohn's motion for summary judgment and Squibb's cross-motion for partial

summary judgment are denied for the reasons set forth in the Court's decision in *Tigue v. E.R. Squibb & Sons, Inc., et al.*, Index No. 03838/76 (Gammerman, J.), ~~and *Hymowitz v. Eli Lilly & Company, et al.*, Index Nos. 24767/86 and 14848/87*~~ (Gammerman, J.), both dated July 16, 1987.

ENTER,

/S/

J.S.C.

IRA GAMMERMAN

F I L E D
SEP 29 1987
COUNTY CLERK'S OFFICE
NEW YORK

[*Interlineation by the Court.]

APPENDIX H

Order of Supreme Court, New York County
(October 16, 1987)

At an individual Assignment Part 27 of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, New York, New York on September 23, 1987.

Present:

HONORABLE IRA GAMMERMAN, Justice.

.....x

JANE DOLAN,

Plaintiff,

-against-

ELI LILLY & COMPANY, E.R. SQUIBB & SONS, INC., THE UPJOHN COMPANY, and WINTHROP-BREON LABORATORIES,

Defendants.

.....x

Assigned to Justice Gammerman
Index No. 23999/86

ORDER

Plaintiff having appeared before this Court on September 18, 1987, and having appeared at that time by Alfred S. Julien, Esq.; and defendant ELI LILLY AND COMPANY having appeared at the aforesaid time by its attorney, Russel H. Beatie, Jr., Esq.; and defendant E.R. SQUIBB & SONS, INC. having appeared at the aforesaid time by its attorney, Barry Epstein, Esq.; and defendant THE UPJOHN COMPANY having appeared at the aforesaid time by its attorney, Jay P. Mayesh, Esq.; and

Plaintiff having moved by oral application for an order granting her partial summary judgment against ELI LILLY AND COMPANY, and severing her claims against it from her claims against THE UPJOHN COMPANY and E.R. SQUIBB & SONS, INC., and having moved for an order severing her claims against ELI LILLY AND COMPANY for trial; and

Defendant ELI LILLY AND COMPANY having moved by oral application on the record staying any trial of the claims against it; and

Defendants ELI LILLY AND COMPANY and E.R. SQUIBB & SONS, INC. having moved by oral application for an order pursuant to Rule 3212 of the Civil Practice Law and Rules granting summary judgment in their favor and dismissing the Complaint against them by the plaintiff on the ground that plaintiff is barred by the applicable Statute of Limitations; and

Defendants ELI LILLY AND COMPANY and E.R. SQUIBB & SONS, INC. having moved by oral application for an order holding L.1986 c.682 §§ 4 and 12 unconstitutional; and

Defendants ELI LILLY AND COMPANY and E.R. SQUIBB & SONS, INC. having moved by oral application for summary judgment dismissing said Complaint against them for plaintiff's failure to allege that ELI LILLY AND COMPANY or E.R. SQUIBB & SONS, INC. was the actual manufacturer of the diethylstilbestrol allegedly ingested; and

Defendant ELI LILLY AND COMPANY having moved for an order precluding the application of collateral estoppel against ELI LILLY AND COMPANY; and

The Court having heard Alfred S. Julien, Esq., of Julien & Schlesinger, P.C., in support of the motion

for partial summary judgment and a severance, and having heard Russel H. Beatie, Jr., Esq., attorney for defendant ELI LILLY AND COMPANY in opposition to said motions and in support of each of the additional motions enumerated above, and having heard Barry Epstein, Esq., attorney for defendant E.R. SQUIBB & SONS, INC. in support of its motion, and the opposition of Alfred S. Julien, Esq.;

NOW, upon motion of Julien & Schlesinger, P.C., it is hereby

ORDERED, that plaintiff's motion for severing the action against ELI LILLY AND COMPANY so that said action can proceed against defendant ELI LILLY AND COMPANY alone is granted; and it is further

ORDERED, that defendant ELI LILLY AND COMPANY, as in *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 492 N.Y.S.2d 584, 482 N.E.2d 63 (1985), is precluded from litigating the following:

"1. Was DES reasonably safe in the treatment of accidents of pregnancy when it was allegedly ingested by plaintiff's mother in 1957?

(No)

2. In 1957 when plaintiff's mother allegedly ingested DES, should the defendant, as a reasonably prudent drug manufacturer, have foreseen that DES might cause cancer in the offspring of pregnant woman who took it?

(Yes)

3. Foreseeing that DES might cause cancer in the offspring of pregnant woman who

took it, would a reasonably prudent drug manufacturer test it on pregnant mice before marketing it?

(Yes)

4. If DES had been tested on pregnant mice, would the tests have shown that DES causes cancer in their offspring?

(Yes)

5. Would a reasonably prudent drug manufacturer have marketed DES for use in treating accidents of pregnancy at the time it was allegedly ingested by the plaintiff's mother if it had known that DES causes cancer in the offspring of pregnant mice?

(No);"

and it is further

ORDERED, that the motions of defendants ELI LILY AND COMPANY and E.R. SQUIBB & SONS, INC. for summary judgment in their favor dismissing the Complaint and each cause of action on the ground that the action is barred by the applicable Statute of Limitations are denied; and it is further

ORDERED, that the motions of defendants ELI LILLY AND COMPANY and E.R. SQUIBB & SONS, INC. for summary judgment in their favor dismissing the Complaint and all claims asserted and for an order declaring L.1986 c.682 §§ 4 and 12 unconstitutional are denied; and it is further

ORDERED, that the motions of defendants ELI LILLY AND COMPANY and E.R. SQUIBB & SONS, INC. for summary judgment in their favor in this action dismissing the Complaint against them for plaintiff's failure to allege

that ELI LILLY AND COMPANY or E.R. SQUIBB & SONS, INC. was the actual manufacturer of the diethylstilbestrol are denied; and it is further

ORDERED, that the motion of defendant ELI LILLY AND COMPANY for a stay of trial of this action is denied; and it is further

ORDERED, that defendants ELI LILLY AND COMPANY and E.R. SQUIBB & SONS, INC. shall have until October 14, 1987, and plaintiff until October 21, 1987, to submit such affidavits and other papers as each shall deem appropriate with respect to their relative positions; and it is further

ORDERED, that the trial of the action of *Dolan v. Eli Lilly and Company* is hereby set down for the Court for November 2, 1987.

ENTER,

/S/ IRA GAMMERMAN

J.S.C.

F I L E D
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COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX I

Supplemental Order of Supreme Court
New York County
(August 17, 1988)

SUPREME COURT : NEW YORK COUNTY
IAS : Part 27

.....x

ELIZABETH TIGUE, et al.,

Plaintiffs,

-against-

E.R. SQUIBB & SONS, INC., et al.,

Defendants.

INDEX NO. 03838/76

SUPPLEMENTAL ORDER

.....x

GAMMERMAN, J.:

In its order and memorandum decision entered July 23, 1987, the Court denied the motions and cross-motions for summary judgment of defendants Rexall Drug Company, The Upjohn Company and Abbott Laboratories. Defendant E.R. Squibb & Sons, Inc. ("Squibb") appeared and argued in support of these motions, but was not formally included in this Court's decision. And it appearing that the plaintiff has consented to this application, it is ordered that defendant Squibb shall be deemed to have filed a formal cross-motion for summary judgment on the same grounds as the other defendants, and the order and memorandum decision denying defendants' motions shall be deemed to deny the motion of Squibb *nunc pro tunc*.

DATED: August 17, 1988

IRA GAMMERMAN

J.S.C.

APPENDIX J

Judgment/Remittitur of New York Court of Appeals
(April 4, 1989)

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

1 No. 56

Mindy Hymowitz,

Respondent,

Eli Lilly and Company, et al.,

Appellants,

and Merck & Co., Inc., et al.,

Defendants,

Attorney General of the
State of New York,

Intervenor-Respondent.

The appellants in the above entitled appeal appeared by the Law Offices of Russel H. Beatie, Jr., Stroock & Stroock & Lavan, Esqs., Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A., Patterson Belknap Webb & Tyler, Esqs., Dickson, Carlson & Campillo, Esqs.; *the respondent(s) appeared by* Rheingold & McGowan, P.C.; the Office of the Attorney General appeared by Andrea Green, Esq.; and the amicus curiae appeared by New York Lawyers for the Public Interest, Inc.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Wachtler. Judges Alexander, Titone and Hancock concur. Judge Mollen concurs in a separate opinion. Judges Simons, Kaye and Bellacosa took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County,

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/S/ DONALD M. SHERAW

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany,. . .April 4, 1989. . .

APPENDIX K

Judgment/Remittitur of New York Court of Appeals
(April 4, 1989)

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

1 No. 57

Elizabeth Tigue, et al.,

Respondents,

v.

E.R. Squibb & Sons, Inc., et al.,

Appellants,

et al.,

Defendants.

The appellants in the above entitled appeal appeared by the Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A., Hughes Hubbard & Reed, Esqs., Stroock & Stroock & Lavan, Esqs., McCarter & English, Esqs., Patterson Belknap Webb & Tyler, Esqs., Dickson, Carlson & Campillo, Esqs.; Phillips Lytle Hitchcock Blaine & Huber, Esqs., Winthrop Stimson Putnam & Roberts, Cole & Deitz, Esqs. and Olwine Connelly Chase O'Donnell & Weyher, Esqs.; *the respondent(s) appeared by* Aaron J. Broder, P.C. and Rheingold & McGowan, P.C.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Wachtler. Judges Alexander, Titone and Hancock concur. Judge Mollen dissents in part and votes to modify in an opinion. Judges Simons, Kaye and Bellacosa took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/S/ DONALD M. SHERAW

.....

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany,. . . April 4, 1989 . . .

APPENDIX L

Judgment/Remittitur of New York Court of Appeals
(April 4, 1989)

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

1 No. 57

Jane Dolan, et al.,

Respondents,

v.

Eli Lilly & Company, et al.,

Appellants,

(and other actions.) #151 actions.

The appellants in the above entitled appeal appeared by the Law Offices of Russel H. Beatie, Stroock & Stroock & Lavan, Esqs., Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A., Cole & Deitz, Esqs., Dickson, Carlson & Campillo, Esqs.;

the respondent(s) appeared by Julien & Schlesinger, P.C. and Sybil Shainwald, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Wachtler. Judges Alexander, Titone and Hancock concur. Judge Mollen dissents in part and votes to modify in an opinion. Judges Simons, Kaye and Bellacosa took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/S/ DONALD M. SHERAW

.....

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, . . April 4, 1989. . .

APPENDIX M

Excerpt from "Brief of Defendant-Appellant E.R. Squibb & Sons, Inc.," filed November 8, 1988, in New York Court of Appeals in *Tigue v. E.R. Squibb & Sons, Inc.* (fn. 4, pp. 12-13):

4. The legislature is best able to resolve the issues of public policy involved in this case. In the joint brief submitted by defendants Merck, Abbott, and Lilly, it is forcefully argued that the adoption of any form of non-identification liability will severely restrict the availability of pharmaceutical products in the future. Squibb concurs with the public policy discussion contained in that brief. Squibb also concurs with, and hereby adopts, that section of the joint brief which contends that any form of non-identification liability is unconstitutional. Defendants' due process rights are violated because they will be held liable for injuries sustained by plaintiffs who were not exposed to their product. Further, such liability also imposes an irrebuttable presumption of causation upon defendants.

APPENDIX N

Excerpt from "Brief on Behalf of Defendants-Appellants Abbott Laboratories, Eli Lilly and Company and Merck & Co., Inc." filed November 8, 1988, in the New York Court of Appeals in *Tigue v. E.R. Squibb & Sons, Inc.* (pp. 31-34):

D. Any Theory of Non-Identification Liability Would Violate Defendants' Due Process Rights.

The due process clause of the Fourteenth Amendment to the United States Constitution and Section 6 of Article I of the New York State Constitution prohibit any deprivation of property without due process of law. The due process clause affords protection against "arbitrary action government," *Wolff v. McDonell*, 418 U.S. 539 (1974), and its protection extends to arbitrary actions of judicial as well as legislative bodies. For an action of a court or a legislature to pass muster under the due process clause, there must be a rational relation between a legitimate state interest, and the judicial or legislative means chosen to further that interest.

By eliminating proof of identification from plaintiff's case, this Court would effectively create a mandatory presumption of causation. That is, a manufacturer would be presumed to be the cause of plaintiff's injury even though it has nothing to do with plaintiff. Indeed, as a practical matter, this presumption would be irrebuttable since defendants in many cases will be unable to prove they did not make the medicine that plaintiffs claim caused injury. Such a presumption is a violation of defendants' due process rights. *Vlandis v. Kline*, 412 U.S. 441, 446 (1976);[21] *Hurley v. Van Lare*, 380 F.Supp.

[21] A mandatory presumption tells the trier of fact "that he or they must find the elemental fact upon proof of the basic fact, at least until the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1978) (emphasis supplied).

167, 175 (S. and E.D.N.Y. 1974) (three judge district court), *vacated as moot*, 421 U.S. 338 (1975).

In order for such a preseumption to withstand due process scrutiny, it must be neither unreasonable nor irrational. *See, e.g., U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508, 514 (1973). Such a presumption valid under the due process clause. *Vlandis*, 412 U.S. at 441.

As a number of courts have recognized in the DES context, any theory which shifts the burden to defendants to disprove causation creates an irrational and unreasonable presumption of liability because there is no certainty that any one or more of the defendants joined in an action produced the drug in question. *Ryan v. Eli Lilly & Co.*, 514 F.Supp. at 1018; *Mizell v. Eli Lilly & Co.*, 526 F.Supp. 589, 596 (D.S.C. 1981); *Tidler v. Eli Lilly & Co.*, 95 F.R.D. 332, 333 (D.D.C. 1982).

There must be a "rational connection between the fact proved and the fact presumed." *Leary v. United States*, 395 U.S. 6, 32-37 (1969) (presumption irrational unless it can be said with substantial assurance that the presumed fact is *more likely than not to flow* from the proved fact on which it is made to depend. [sic]" (emphasis added)); *Tot v. United States*, 319 U.S. 463 (1943). These rules governing presumptions apply not only to the statutory presumptions at issue in *Tot* and *Leary*, but to judicially created presumptions as well. *Wray v. Folsom*, 166 F.Supp. 390, 395 (W.D. Ark. 1958).

Here, the proved fact is that a defendant made stilbestrol. In most DES cases, there is no proof that any defendant made the stilbestrol ingested by a particular plaintiff. Indeed, in some cases, there is affirmative proof that the defendants did not. With literally hundreds of possible manufacturers, most of them not before the Court, the probability that any one

defendant supplied the product which caused the injury is at best pure conjecture. Any theory which permits plaintiffs to prevail, then, must depend on a conclusive presumption that because a defendant sold a product similar to the one that caused the injury, the defendant's conduct caused the injury. Such a theory rests on an illogical presumption, and fails to satisfy the requirements of due process.

E. The First Department's Rule of Conscious Parallelism Is A Particularly Egregious Violation of Defendants' Due Process Rights.

The First Department's conscious parallelism theory is particularly egregious in its disregard for defendants' constitutional rights. By equating legitimate parallel business behavior with "concerted action," conscious parallelism creates an arbitrary and irrebuttable presumption which violates the due process clauses of the fourteenth Amendment and article I, § 6 of the Constitution of the State of New York.

The constitutional prohibition against such types of presumptions was best stated by the Supreme Court of the United States in *Western & Atl. R.R. v. Henderson*, 279 U.S. 639 (1928), when it struck down a statute establishing a conclusive presumption against a railroad company for damages to any person or property injured at a crossing—a presumption rebuttable only if the company made it clear that it exercised all due care. The Court said, "[a] statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment." 279 U.S. at 642. The Court has been consistent in striking down such presumptions. *See, e.g., Vlandis*, (invalidating Connecticut statute establishing a presumption of nonresidency against

certain students and requiring them to pay higher tuition rates); *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632 (1973) (striking down mandatory maternity leave statute on the ground that it established a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties).

Application of conscious parallelism here would also have the *retroactive* effect of holding defendants liable for behavior which was not actionable at the time the behavior was undertaken some thirty or forty years ago. Regardless of the fact that the First Department has now declared consciously parallel behavior actionable and punishable with joint and several liability, defendants could not be fairly said to have had warning that any nontortious parallel conduct in which they independently engaged in 1941 or 1947 would someday be the basis for the imposition of joint and several liability. This retroactive application of the rule violates due process. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Valladares v. Valladares*, 80 A.D.2d 224, 438 N.Y.S.2d 810 (2d Dept.), *modified sub nom., Tucker v. Tucker*, 55 N.Y.2d 378, 434 N.E.2d 1050, 449 N.Y.S.2d 863 (1981) (retroactive application of new legislation may offend due process clause); *cf. Marks v. United States*, 430 U.S. 188, 191-192 (1977); *see also Casillas v. Scully*, 769 F.2d 60, 65 (2d Cir. 1985) (finding that "unforeseeable" judicial enlargement of a criminal statute is violative of the due process clause).[22] It is the very reason

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[22]The offense to state protected due process is equally clear. The reach of the protections afforded by the Bill of Rights in the New York State Constitution is equal to and in some cases even exceeds that of the comparable clauses of the United States Constitution. *People v. Adams*, 53 N.Y.2d 241, 423 N.E.2d 379, 383, 440 N.Y.S.2d 902, 906 (1981).

why courts presume that unless clearly stated legislation creating new rights is prospective only, *Jacobus v. Colgate*, 217 N.Y. 235 (1916); *In re Ayman*, 9 N.Y.2d 119, 125, 172 N.E.2d 571, 573, 211 N.Y.S.2d 198, 200-201 (1961); and where retroactivity expressly intended by the legislature would offend due process, the statute is not upheld. *Chrysler Properties, Inc. v. Morris*, 23 N.Y.2d 515, 297 N.Y.S.2d 115 (1966); *Phillips v. Agway, Inc.*, 88 Misc. 2d 1087, 389 N.Y.S.2d 977 (Sup. Ct. 1976).[23]

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[23] *Bichler* may also violate the first amendment if the "evidence" relied upon to prove "consciously parallel behavior" is the petitioning of the government for the approval of the drug in 1941 or 1947. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court held that railroads that petitioned the legislature in order to achieve laws harmful to competitors could not be held to have violated the Sherman Act because such activities were protected by the first amendment. Although originally developed in antitrust cases, the Noerr doctrine has been extended to petitioning other branches of government, *e.g.*, *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), and to other areas of the law including allegedly tortious behavior, *State of Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1317-1319 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 542 (5th cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *Senart v. Mobay Chem. Corp.*, 597 F.Supp. 502, 506 (D. Minn. 1984).

APPENDIX O

Excerpt from "Brief of Defendant-Appellant E.R. Squibb & Sons, Inc. Relying Upon Its Brief In *Hymowitz v. Eli Lilly* and *Tigue v. E.R. Squibb & Sons Inc.*," filed November 8, 1988 in *Dolan v. Eli Lilly & Co.* (p.1):

This appeal presents two issues which have been fully briefed by defendant-appellant E. R. Squibb & Sons, Inc. (Squibb) in two other appeals which are currently before this court. The first issue presented in this appeal is the constitutionality of the revival statute (L.1986, ch. 682 §4), and Squibb hereby adopts its principal brief and reply brief filed in *Hymowitz v. Eli Lilly & Co.*, App. Div. Case No. 31981. The second issue presented by this appeal is the viability of any "non-identification" form of liability, and Squibb hereby adopts its principal brief (and reply brief, if one is filed) in *Tigue v. E. R. Squibb & Sons, Inc.*, App. Div. Case No. 31980.

APPENDIX P

Excerpt from "Brief of Appellant E.R. Squibb & Sons, Inc." filed November 16, 1987 in New York Supreme Court, Appellate Division, First Department, in *Dolan v. Eli Lilly & Co.* (pp. 63-69), and *Tigue v. E.R. Squibb & Sons Inc.*, (pp. 63-68):

X.

Any Form of Liability Without Proof of Causation Would Be Unconstitutional, Because There Would Be a Presumption of Causation Without Any Rational Basis.

Due process is denied where a defendant is subject to liability for an injury having no causal connection to that particular defendant's conduct. The essence of any modified theory of liability is that it dispenses with the requirement of a plaintiff proving cause in fact, a connection between a particular defendant's conduct and the plaintiff's claimed injury. In such a context, a plaintiff is allowed to sue one or all of the members of an industry, all of whom may be held liable to the plaintiff, even though only one out of several hundred members of the industry may have actually harmed the plaintiff. It is submitted that the abandonment of causation as an element of a cause of action, through the fiction of shifting the burden of proof, constitutes a violation of each defendant's separate right to due process of law.

The "touchstone" of due process is protection of a party against "arbitrary action of government." *Wolff v. McDonald*, 418 U.S. 539, 558 (1974). A rule of law permitting one individual to sue selectively an entire industry with hundreds of members, for the conduct of only one member, or the conduct of no member, constitutes such arbitrary action.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court invalidated a state law that established a presumption that an unwed father is an unsuitable parent. It was held that such a presumption violates due process, and that every unwed father is entitled a particularized determination of parental fitness on the basis of individualized proof. Similarly, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), it was held that the due process clause requires that each defendant have a separate and meaningful opportunity to be heard. A rule may "offend due process because it operates to foreclose a particular party's opportunity to be heard." 401 U.S. at 380. A state "owes to each individual that process which, in light of the values of a free society, can be characterized as due." 401 U.S. at 380. Any modified theory of liability violates the principles of *Stanley* and *Boddie* because it lumps the defendants together as an entity, failing to recognize that each defendant has separate and independent constitutional protections. Since the constitution requires an individualized determination of each defendant's liability, the fundamental burden of proving causation cannot be satisfied by considering the defendant as a group. There must be evidence of the conduct of each defendant individually and as to each element of liability.

In *Vachon v. New Hampshire*, 414 U.S. 478, *reh. den.*, 415 U.S. 952 (1974), the United States Supreme Court struck down a conviction based on a record lacking any relevant evidence as to a crucial element of a particular offense. It was held that such a conviction violated due process. The state was not allowed to simply dispense with an element of an offense. It is constitutionally required that the prosecution must convince the trier of fact of all essential elements of guilt. *In Re Winship*, 397 U.S. 358, 362 (1970).

On occasion, states have attempted to dispense with the requirement of proving an element of a criminal offense by shifting the burden of proof on the issue to the defendant. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), theSupreme Court rejected such an attempt. The doctrine of the Winship case was applied so as to preclude shifting the burden of proof on the defendant's state of mind. Similarly, the Mullaney court noted that the Winship doctrine could not be avoided simply by redefining the elements which constitute various crimes. 421 U.S. at 698.

The above cases demonstrate that, although states have considerable latitude in establishing procedures, they may not arbitrarily tamper with the elements of an offense or a cause of action, which are established by the traditions and conscience of our people. States may not achieve this end by purporting to shift the burden of proof to a defendant.

The requirement of establishing a causal connection between a defendant's conduct and his civil or criminal liability is, it is submitted, rooted in the most fundamental beliefs of our people. It is a violation of due process to convict and punish a man without evidence of his guilt. *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960). Similarly, it is a violation of due process to impose civil liability on the defendant who, demonstrably, never harmed the plaintiff.

The principles of the above cases are applicable to both civil and criminal proceedings. The United Supreme Court has consistently rejected efforts to eliminate required elements of a cause of action or an offense, or arbitrarily shift the burden of proof in violation of due process.

Furthermore, due process is unavailable where a State creates a presumption of causation having no rational basis in fact or in legal precedent. To shift the burden of proof on causation to each of the defendants is, in effect, to create a mandatory presumption of causation. A mandatory presumption is a "troublesome evidentiary device." *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 2224 (1979). Such a presumption is one that tells the judge or jury that "he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." 99 S.Ct. at 2224-2225.

A theory of group liability without identification undoubtedly can be classified as a "mandatory presumption." Plaintiff need merely demonstrate prenatal exposure to DES and that a particular defendant was a manufacturer or supplier of the type of product involved. It is then presumed that the plaintiff was exposed to the particular defendant's product, unless the defendant can demonstrate that its product could not have reached the plaintiff. Such an unusual case might occur where, for example, a particular defendant entered the national market after the time that the plaintiff was exposed to DES. However, in the absence of such evidence, the presumption of causation operates against all of the defendants in the market place.

It should be noted that judicially created presumptions are subject to the same constitutional scrutiny as those established by legislation. *Wray v. Folsom*, 166 F.Supp. 390, 395 (W.D. Ark. 1958). In order for a presumption to pass constitutional muster, there must be "some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable

as to be purely arbitrary mandate." *Mobile, Jackson & Kansas City Railroad Company v. Turnipseed,* 219 U.S. 35, 43 (1910). This rule is applicable "in either criminal or civil cases" and a presumption must not "shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue." 219 U.S. at 43.

In *Manley v. Georgia*, 279 U.S. 1 (1929), for example, the United States Supreme Court reviewed the constitutionality of a Georgia banking law which established a presumption of fraud upon proof of a bank's insolvency. From the mere failure of the bank financially, criminal guilt and apparently civil liability were created, subject only to the right of the defendant to rebut the presumption. This liability extended to the president of the bank and all of its directors.

Unsurprisingly, the conviction of Mr. Manley was overturned by the Supreme Court, which found that the statutory presumption was unreasonable and arbitrary. It was noted that insolvency could be established without regard to the particular facts causing it, and without regard to specific facts of any particular transaction. Furthermore, the court noted that the presumption was "sweeping," extending to all directors without proof of any individual responsibility. 279 U.S. at 6. Under the statute, a defendant "is to be convicted unless he negatives every fact, whether act or omission in the management of the bank, from which fraudulent insolvency might result, or shows that he is in no way responsible for the condition of the bank." 279 U.S. at 7. Such a burden of proving a negative was held so severe as to be unconstitutional.

More recent cases have condemned the use of presumptions as substitutes for individual fact finding.

See, for example, *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 649 (1974). Presumptions which are neither necessarily nor universally true are disfavored under the Constitution "because they preclude individualized determination of the facts upon which substantial rights or obligations may depend." *Coleman v. Darden*, 595 F.2d 533, 536 (10th Cir. Colo. 1979), *cert. den.*, 444 U.S. 927 (1979).

Also, due process is violated when a defendant is subject to civil liability merely because of its status as a manufacturer, and not because of any particular conduct. The foundation of both criminal and civil liability is conduct on the part of the defendant. In either case, there must be an act or omission in violation of society's rules of conduct and, in the civil case, the conduct must have injured the plaintiff. A defendant cannot be held liable simply for his status, however disagreeable that may be.

The distinction between a defendant's "status" and his "conduct" was drawn in the leading case of *Robinson v. State of California*, 370 U.S. 660, *reh. den.*, 371 U.S. 905 (1962). In *Robinson*, a conviction was reversed which may have been based on the defendant's "status" as a narcotics addict, as distinguished from any use, possession, or sale of a narcotic substance.

It might be possible to infer that any narcotics addict must have, at some time, illegally possessed or used a prescribed substance. However, the Supreme Court held that the constitution requires proof of the actual illegal conduct, as distinguished form [sic] the status ultimately resulting from that conduct.

A modified theory of liability relieving plaintiff of her burden of product identification permits civil liability on the part of a defendant solely because of its status

as a manufacturer or supplier of DES. This is true, even though each defendant separately appeared in the market place, complied with the requirements of federal law regulating drugs, and separately distributed its product. It is submitted that no state may constitutionally create liability in favor of a single person against all parties enjoying the "status" of manufacturer or supplier of a particular product.

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(2) (3)

Nos. 89-168 & 89-204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

REXALL DRUG COMPANY,

Petitioner,

vs.

ELIZABETH TIGUE, *et al.*,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

MINDY HYMOWITZ and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

(For Continuation of Caption See Reverse Side of Cover)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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23 pp

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E.R. SQUIBB & SONS, INC.,

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vs.

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

QUESTIONS PRESENTED

1. Where trial has not yet been held and there has been no determination of liability, can a final judgment be presented for this Court to review under 28 U.S.C. 1257?

2. Where a woman cannot identify the maker of a product which injured her, are due process concepts violated when the responsibility of various makers is measured by the amount of risk each created to the group of users?

3. Is a state court pre-empted from determining if a drug supplier is negligent under common law standards merely because a federal agency allowed it to market the product several decades ago?

4. Does a state statute which revived previously barred claims against certain product manufacturers violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment?

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STATEMENT OF THE CASE

Petitioners have misstated the record below, both as to what the court held and as to the significance of the holdings, especially as to a claim that the decision by the Court of Appeals is radical or unique. Further, petitioners have made factual misstatements about the case and have made policy arguments to this Court irrelevant to any constitutional issue. Following the discussion of these points, the Statement of the Case describes the plaintiffs to this action and analyzes the potential consequences of the decision.

A. *The Record Below is Seriously Misstated*

Three incorrect statements are made by petitioners about the holdings below, creating a rather serious misimpression about that decision.

1. Both petitioners state that the court below was critical of its own decision by making the following statements about it:

- it will not "provide a reasonable link between liability and the risk created by the defendant" (Decision, Rexall Pet. Br. 12a)[1]

- it will "likely result in a disproportion between the liability of individual manufacturers and the actual injuries" (12a)

- "the chance that a particular producer caused the injury is often very remote." (6a)

If indeed the court below had made these statements about its own holding and the rationale therefor, these petitioners would have something significant to reprove. However, what the decision below so obviously does when one reads these quotes is to reject them. Perhaps in their outrage petitioners did not understand, but the quote from Decision 6a explains the

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[1] All references to the Court of Appeals *Hymowitz* decision are to the Rexall Appendix, prefaced by "Decision."

rationale for another form of liability, alternative liability, and in the next sentence the court rejects it!

The two quotes from Decision 12a are set forth in the opinion as part of the rationale given by *other* courts, and the court clearly rejects them. Immediately after these the court begins: "Instead," and then proceeds to supply the acceptable reasons for the adoption of market share.[2] In Point II we demonstrate that this analysis is not constitutionally irrational or wholly arbitrary.

2. Both petitioners state that the court below imposed liability on them. (Rexall Pet. Br. 10; Squibb Pet. Br. 10-11.) It did no such thing; the decision has nothing to do with liability. It determined that, where a person cannot identify the DES which her mother took, she may sue the manufacturers collectively, each for its own share, on the rationale that each put out a fungible, unlabeled product, at a time so long ago (due to the latency of the injuries) that innocent victims could no longer be expected to determine who made the DES involved.

The issue reached the Court of Appeals on defendants' motion for summary judgment, which therefore necessitated the temporary assumption by the courts involved of the truth of the complaints that the defendants were liable under New York's product laws. There have been no findings of liability yet. The cases were remanded for trial on that issue, and also for proof of causation and damages in each individual case. The only matter which is established, therefore, is that if Rexall or Squibb is found liable, and it caused damages, it will have to pay pursuant to the share of the national market it had.

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[2] "Instead, we choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large. Use of a national market is a fair method, we believe, of apportioning defendants' liabilities according to their total culpability in marketing DES for use during pregnancy. Under the circumstances, this is an equitable way to provide plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants." Decision 12a.

3. Only in New York, petitioners argue falsely, can a DES manufacturer be held liable even if it can show it could not have made the DES which caused the injury. (Rexall Pet. Br. 8-9, n.4; Squibb Pet. Br. 6-7) In fact, that is also the result of prior rulings by the Supreme Courts of Michigan and Washington, and some lower courts (see Part IIA below). Further, manufacturers may seek exculpation in New York (see Part IIA below).

A sizeable part of petitioners' briefs also presents as statements of facts matters which are either not correct or which are designed to raise sympathy for them on issues extraneous to their limited constitutional appeal, as follows:

1. DES was not known to be dangerous until 1971. (Rexall Pet. Br. 6; Squibb Pet. Br. 4) In fact, there was considerable literature about its risks during the time it was on the market in the 1950s and 1960s. (Plaintiff's brief in *Tigue v. E.R. Squibb & Sons, Inc.*, Court of Appeals, p.13.)

2. Plaintiffs have lost DES cases at trial, and in one case it took the jury "just two hours" to decide the case (Squibb Pet. Br. 7). (As this Court may imagine, plaintiffs have won cases.) Squibb then concludes from this "fact" that the defendants are not the wrongdoers that the Court of Appeals assumed them to be. The court below so assumed since it was dealing with motions on the pleadings, and, in any case, we are confident that the Supreme Court will not take a case such as this in order to correct a factual determination made by a lower court.

3. The proof of causation is weak (Squibb Pet. Br. 5).

4. The decision below inhibits drug companies from making much needed, life-saving drugs, citing, *inter alia*, the New York Times (Rexall Pet. Br. 15-16, n.8). (We believe that no comment is needed on these last points.)

B. *Plaintiff Mindy Hymowitz and Others*

Plaintiff Mindy Hymowitz, at age 24 in April 1979, developed a cancer of the cervix, technically known as clear cell

adenocarcinoma. Her cervix, uterus and most of her vagina were removed surgically as a treatment for this condition. During the surgery, a nerve was inadvertently severed, causing her a permanent loss of bladder control. Her physicians reported her case in the medical literature, attributing the cancer to her mother's ingestion of DES during her pregnancy. (Plaintiff's Brief in *Hymowitz v. Eli Lilly & Co.*, Court of Appeals, p.4.) Under New York law as it existed in 1979, Miss Hymowitz could not sue any DES manufacturers because the statute of limitations had expired. Thereafter the revival act of 1986, L. 1986 c. 682, permitted her to sue, which she promptly did. *Id.* at 3.

Miss Hymowitz and her counsel have investigated the facts surrounding her mother's use of DES. Although diligent efforts have been made, it has proved impossible to determine whose brand of DES her mother took. (Plaintiff's Brief in *Tigue v. E.R. Squibb & Sons, Inc.*, Court of Appeals, note p.14.) Her suit, therefore, is against seven of the major suppliers of DES at the time she was exposed *in utero*.[3]

The facts of Mindy Hymowitz's case are similar to hundreds of other women in the litigation at bar. The New York Court of Appeals had before it a record that showed that: (a) these women were almost all unable to identify the supplier of DES which injured them; (b) this inability arose due to no fault of their own; (c) a major part of their inability arose from the decision of the DES manufacturers to supply generic, unbranded and similar looking DES medication; and (d) another reason for inability to determine the supplier was that the injury which DES caused was insidious and took many years to put in an appearance, by which time, in the normal course of record disposal and loss of recollection, it was impossible to determine the supplier. Decision 4a-8a.[4]

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[3] Since commencement of her lawsuit, plaintiff has entered Brooklyn Law School and has naturally shown great interest in the legal aspects of her case (Plaintiff's brief in Court of Appeals, p.4).

[4] Of course, if a plaintiff can identify the brand of DES her mother used, then she need not and may not rely on market share. Her suit is against the actual supplier—if she has sued it. Decision 4a.

C. *The Practical Consequences of the* Hymowitz *Decision, and of its Affirmance or Reversal*

A contrast between the decision by the majority below and the dissent is quite illuminating, we would suggest, as to what has happened to New York's 700-1000 women who are now before this Court, and in turn what might happen if *certiorari* were granted.

The New York women will not get a full recovery for their injuries under the majority's decision. While they are given, on the one hand, an opportunity to collect some money for their injuries (if proved) from all those manufacturers who contributed to their risk of injury, on the other hand they are deprived of making a full recovery. This is because: (a) it is impossible to sue 100% of the market of suppliers, since many are no longer in business, Decision 6a; and (b) the Court of Appeals rejected the application of New York's long standing joint and several liability law to this case, Decision 13a. The latter ruling insulated those defendants who must contribute from having to pay more than their absolute market share. As the market was calculated in one jurisdiction already, *In re Complex DES Litigation*, No. 830109 (Cal. Super. Ct.), cited in Plaintiff's brief in *Tigue*, p.24, many women receive less than 50% of their full damages once joint liability is extinguished.

The dissenting opinion, which is praised by these two petitioners for accepting the concepts of exculpation, would have nonetheless retained New York's joint tortfeasor rule, Decision 18a, thereby ensuring that each woman would receive 100% of her damages — although presumably from a lesser pool of defendants.

Thus, each opinion reflects a balancing between concerns for the defendants and concerns for the plaintiffs. For some reason the two petitioners are unhappy with the balancing act which the majority performed, whereas it is fair to construe the non-participation by the many other defendants below as indicating that they would rather live with this balancing than with what would probably happen if this Court were to reverse the

majority's ruling. For, if the Court of Appeals on remand were to adopt the dissenting view, or some other solution being proposed to deal with what all the judges recognized was the intolerable non-identification problem, then our plaintiffs might well receive full compensation.

REASONS FOR DENIAL OF THE WRIT

I. *The Decision Below Lacks Finality*

The decision below does not finally determine the constitutional rights of the petitioners in a way which precludes further review nor which threatens irremediable harm to them at present. First, the decision below arose on an interlocutory appeal from the denial by a trial-level court of a summary judgment motion by DES manufacturers. Contrary to the statement in Rexall's brief (Pet. Br. 3), there has been no trial. Rexall has not been held liable to pay any money, either by a trial court or an appellate court. As observed in the Statement of the Case, Rexall may well be found not to be liable if and when a liability trial under New York product law is held. Or it may be found in any individual case not to have caused the injury, or perhaps it will claim that it did not promote DES for pregnancy usage, or it may end up with a jury finding of no share of the market.

Any claims of unconstitutionality which petitioners have are preserved for later review, should they hereafter be held liable and to have to respond in damages. *Flynt v. Ohio*, 451 U.S. 619 (1981) at 621: review "can await final judgment without any adverse effect upon important federal interests." There would be a distinct benefit to this Court to have the results of further proceedings, including a trial, in order to evaluate any alleged constitutional infirmities. Only then would an adequate factual record exist. *See Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981); *O'Dell v. Espinosa*, 456 U.S. 430 (1982). Further, the various exceptions set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), are not applicable.[5]

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[5] Other courts adopting market share or similar means of avoiding the need for identification have recognized that in so doing they were leaving it to

(Footnote continued)

II. *A Market Share Rule Does Not Violate The Fourteenth Amendment*

A. *New York's Solution To The Non-Identification Problem Is Not Irrational*

The decision by the Court of Appeals to adopt a market share rule, to deal with the problem of the inability of women to determine the brand of DES their mothers used, was a rational, common law response which has substantial antecedents. Or at least, given the application of the rational analysis test to the action of the state court (petitioners do not claim any other test should be used), the action taken was not irrational nor wholly arbitrary. (The holding of the court is quoted at footnote 2.) It should also be noted that the numerous constitutional issues raised in these petitions were not discussed in any of the appellate decisions.

The petitioners' due process challenge based upon irrationality proceeds on two roads. The first is to miscite from the decision below; the second is to suggest that the decision jumps radically beyond common law of New York or "good" general jurisprudence. As for misstating the record, we review in Section A of the Statement of the Case the errors made by petitioners in quoting from the decision below: the Court of Appeals did not label *its* rationale for the use of its form of market share as lacking a "reasonable link" or that the chances were "remote" that a defendant who was held to pay made the drug in question. It expressly *rejected* these and similar rationalizations.

Understandably, since petitioners want to attack the reasonability of the decision below, they studiously ignore the rationale for the decision given by the court to utilize a national market share for the some 700-1000 women now involved in the New York DES litigation: each manufacturer created a risk when it put a dangerous product on the market, and that a fair way

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the lower courts by subsequent proceeding to develop details of the concept. *See e.g., Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 527 N.E.2d 333 (1988) at p. 346. In states which have had market share for some time the highest courts have re-reviewed their decisions in further appeals, *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988); *George v. Parke-Davis*, 107 Wash. 2d 584, 733 P.2d 507 (1987).

to quantify the risk was by the amount of the product which it sold in comparison to the total sold. (Decision 12a)

In the California DES litigation cited by the Court of Appeals (*In re Complex DES Litigation, supra*), for example, petitioner Rexall was found to have had between .5 and .9 percent of the DES market for various years at various strengths of the medication (that is, less than 1%). If we assume that ultimately 1000 New York women will have their damages assessed pursuant to a similar market share worked out here, Rexall will pay, say, .7 percent, more or less — or the equivalent of only 7 women! What the Court of Appeals decided, as a factual and legal matter therefore, is that this approximates, as best as legal ingenuity can, the probabilities that New York mothers did get their DES at Rexall drugstores (7 in 1000).

Rexall, Squibb, and every supplier of DES in the 1950s and 1960s is responsible for creating the risk of injury to all DES users. This rationale underlies every one of the decisions adopting market share: *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912, (1980); *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied sub nom. E.R. Squibb & Sons, Inc. v. Collins*, 469 U.S. 826 (1984); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Smith, supra; McCormack v. Abbott Laboratories*, 617 F. Supp. 1521 (D. Mass. 1985); *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983).[6]

The collective liability which petitioners portray as so "radical" has long been embedded in the common law, with the market share solution below being nothing more than a variation of the theme of how the law will deal with a single injury caused by one of potentially multiple tortfeasors. (a) *Alternate*

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[6] Most of the case citations given by both petitioners for propositions relating to the unfairness of market share are to those lower court cases which rejected market share or its equivalent in DES cases. Squibb Pet. Br. 13-15, Rexall Pet. Br. 8, n.4. At the most all this proves is that there are several schools of thought in the states in this developing field of product liability. Varying common law solutions to a problem do not create inherent constitutional conflicts, however.

liability: the two hunters situation, where the one who did not shoot the person is nonetheless liable, *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); Restatement (Second) of Torts, Section 433B, applied to the DES situation in *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 469 U.S. 833 (1984); (b) *concert of action*: one car in a drag race hits the pedestrian, other racers are liable; Restatement (Second) of Torts, Section 876, applied to DES in *Abel, supra; Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982); and (c) *enterprise* or *industry-wide liability*: all makers of blasting caps are held liable although only one made the product which exploded, causing injury, *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

Further, and contrary to what petitioners tell this Court, the *Hymowitz* decision is not unique among DES cases in holding manufacturers liable even though they can prove in an individual case that they could not have made the DES which caused the injury.[7] In *Abel*, 343 N.W.2d at 174, the underlying tenet of the decision is that all defendants acted wrongfully in relation to each plaintiff. No manufacturer was to be exculpated. In *Brown*, 751 P.2d at 470, which reviewed the market share rule California had previously adopted in *Sindell*, 607 P.2d at 924, the court stated of the prior decision: "We realized that in order to provide relief to an injured DES daughter faced with this dilemma, we would have to allow recovery of damages against some defendants *which may not have manufactured the drug that caused the damage*. To protect such defendants against excessive liability, we considered and rejected three separate theories of liability suggested by the plaintiff, and formulated, instead, the market share concept." *Emphasis added*. And in *McCormack*, 617 F. Supp. at 1527, the district judge adopted market share because any disproportion "between potential liability and actual responsibility is significantly reduced." Continued that court as to its market share rule, "It is conceded that in some situations

[7] Nor is it accurate to state that the decision below does not permit DES manufacturers to exclude themselves from responsibility. If they did not market the drug for the uses for which plaintiffs' mothers took them, they are excluded. Decision 13a.

a defendant will be held liable to a particular plaintiff whose injury it did not actually cause." (*Id.*)[8]

B. *No Federal Interest Compels Overriding A Matter Of Purely State Tort Law*

This Court has consistently rejected petitions for writs of certiorari in DES cases involving market share and related issue. *Sindell, supra; Collins, supra; Abel, supra.* Nor, to our knowledge has this Court reviewed any cases in the tort field relating to the use of similar doctrines in any product situation.

"[T]he State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action

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[8] We would like to deal briefly with four of petitioners' favorite epithets: "unlimited victim compensation," "wrongdoer," "practical," and "badge of infamy." As far as the challenge that the decision below creates a "system of virtually unlimited victim compensation" which petitioner Squibb excitedly accuses New York of doing (Squibb Pet. Br. 20), in fact it has created a system where no woman will get full compensation and most will receive less than 50% of their damages, because the great majority of the manufacturers whose market shares must be counted toward the total have not and could not be sued. *See* Statement of the Case, Section C.

As for use of the "wrongdoer" language (Squibb Pet. Br. 7), as we have pointed out in the Statement of Case, Section A, this is an assumption made by the court on a summary judgment motion. However, for these defendants now to portray themselves as innocent (Rexall Pet. Br. 18), is equally inapposite. Nonetheless, it is pleaded that they were careless, and the highest courts of California, Michigan, Washington and Wisconsin, as cited above, have all indulged in the assumption that these companies were wrongdoers.

Another word used by Chief Justice Wachtler in the decision below also throws petitioners into a huff: "practical" – that market share is being adopted for "essentially practical reasons." (Decision 12a) Somehow the implication petitioners want to draw from this is that the decision must be wrong because it is founded, in part, on practical reasons. Of course, they can support their feelings with citations to no cases from this Court or lower ones, because there is no gulf between the jurisprudential and the practical. Nor do we perceive that the imposition of responsibility in the present case represents a "badge of infamy." Rexall Pet. Br. 15.

that is wholly arbitrary or irrational," *Martinez v. California*, 444 U.S. 277 at 282 (1980).

A common law determination by a state court in the field of product liability about how to deal with the burden of proof and the identification of tortfeasors is a paradigm of a state's interest in fashioning its own tort law. And while petitioners strive mightily, what is the wholly arbitrary invasion of a federal interest petitioners assert?

C. *No "Retroactive Legislation" Is Created Depriving Petitioners Of "Vested Rights"*

Another due process challenge petitioners assert is that potentially holding them responsible under the New York decision violates a ban on retroactive legislation. First, however, this is not legislation; it is a common law decision. Second: "As a rule, judicial decisions apply 'retroactively.' *Robinson v. Neil*, 409 U.S. 505, 507-508 (1973). Indeed, a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). Therefore, one cannot generally have a "vested right" in a common law decision, nor do petitioners cite a case to the contrary. Two general aphorisms are also perhaps applicable: no one has a vested right in any given mode of procedure, *Ex parte Collet*, 337 U.S. 55 (1949); no constitutional right can be based on the error of a prior court decision, *Dunbar v. New York*, 251 U.S. 516 (1920).

Even retroactively spreading liability by statute is not necessarily violative of the Constitution. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court upheld a scheme which spread the costs of lung disease back to coal mine operators who had been former employers, forming somewhat of an analogy to the spreading of the costs of injury in the present case. This Court stated, "It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader costspreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." (428 U.S. at 19). *See also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1975).

Equally conclusive on the issue of retroactivity and property rights is that the *Hymowitz* decision in fact did not change the law of New York. The decision was fashioned to solve a new fact problem by applying existing New York precedents to it. Further, the concept of market share in DES cases had been around a decade, (*Sindell, supra*, and petitioners, among others, had participated in the California proceedings (*In re Complex DES Litigation, supra*)). Therefore, surprise cannot be claimed.[9]

D. *No "Unrebuttable Presumption" Is Created, Nor Is There An Unconstitutional Change Of The Burden Of Proof*

It takes some degree of torture to turn the decision below, holding all manufacturers potentially responsible, into the creation of an "unrebuttable presumption."[10] Nor, according to recent decisions of this Court, would such a presumption be a per se violation of the constitution.

What the court below held was that all sued manufacturers (unless exculpated for various reasons) created a risk to the offspring of all women who used the drug. It did not hold that Squibb or Rexall made the drug which injured Miss Hymowitz or other plaintiffs, only that whether it made that drug or not it participated in the creation of a risk for which it is therefore responsible, but only for the proper percentage of the risk it created.

Using the rational analysis test (as would be used in this case, see introduction to Point IIA above), this Court allowed as a

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[9] Further, the doctrine of collective liability traces back to decisions decades ago, see Point IIA above. In the form of concert of action it had already been applied to DES manufacturers in New York in 1982, *Bichler, supra*, from which no *certiorari* was sought.

[10] This issue was not raised in the trial or intermediate appellate court, but only for the first time in the Court of Appeals. Like all others it was not ruled on by the Court of Appeals.

reasonable classification an "irrebuttable presumption" that disability of coal miners was due to black lung disease. *Usery, supra*. The *Vlandis v. Kline*, 412 U.S. 441 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), cases cited by petitioners represent analyses made under strict scrutiny analysis. Petitioner Squibb's arguments about burden of proof (Pet. Br. 15) rely upon cases dealing with causation. In the litigation yet to be held in New York, plaintiffs individually will have to prove that their exposure to DES caused their injuries – to the degree of proof (preponderance) already required under New York law. Nothing in the decisions by this Court cited by petitioner relates, even indirectly, to the identification issue in the case at bar.

III. *There Has Been No Pre-emption Violative Of The Supremacy Clause*

Petitioner Rexall would override New York's law relating to the identification of DES tortfeasors by the Supremacy Clause. This is an argument it alone among defendants in this litigation has urged, and one which the appellate courts have not discussed. Even if one conceded, for the moment, that there are pre-emption issues in this case and that this Court might someday step into the field as it relates to product liability, this would hardly be the case since there is little record and no reflection by judges below on the issue.

This Court stated in a similar situation: "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *McCarty v. McCarty*, 453 U.S. 210, 220.

The determination by a state court to use a market share approach to an identification problem hardly could, in any case, be pre-empted by the mere fact that at some time decades ago a federal agency permitted a product to be sold. This is not a case where liability is being imposed for the mere sale of a product (indeed, it is not even a liability decision, as observed above). This is a case where it is alleged that the defendants

marketed the product without doing the testing and warning which New York's common law required of them at the time of sale. *Hymowitz* Verified Complaint R 00029.[11]

IV. *The New York Revival Act Violates Neither The Equal Protection Nor Due Process Clause*

Petitioner Squibb (but not Rexall) argues that the revival statute, by which plaintiff Hymowitz and other victims presently maintain their suit, is violative of the Due Process Clause by allowing the revival of what had been barred causes of action. The Court of Appeals (Decision 15a), and the trial court in a separate opinion, (Rexall Pet. Br. 38a), had no problem rejecting this argument, finding in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), a clear and simple power for the legislature to amend the statute of limitations to allow for revival of old claims, as nothing more than procedural adjustment. One does not have a "vested right," the case holds, in the continuation of a statute of limitations.

Contrary to the spurious argument that this Court has somehow walked away from the holding in *Chase* (itself built upon a 1885 decision, *Campbell v. Holt*, 115 U.S. 620), the Court has in fact repeatedly regarded statutes of limitations as procedural creations of the state, relying on *Chase*. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

Finally, in the waning paragraphs of its petition, Squibb revives a second argument for unconstitutionality in the revival law: lack of equal protection. Here again the Court of Appeals (Decision 16a), not to mention the trial court (Rexall Pet. Br.

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[11] While cases in lower courts go in various directions on the pre-emption issue with a great variety of products, there is a solid line of pharmaceutical cases which have denied the use of the doctrine to block suits based upon violation of common law negligence duties. *Hurley v. Lederle Laboratories*, 851 F.2d 1536 (5th Cir. 1988); *Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir. 1988).

38a), made short work of the claim, by pointing to substantial evidence in the record that there was special information and need to act in reviving barred DES claims compared to the whole world of toxic tort claims. As observed by all, if a pressing need arises to revive the cause of action for other products, the state legislature will do it then. This is a matter peculiarly within the police power of a state.[12]

CONCLUSION

This Court should deny the petition for certiorari for the reasons stated.

Dated: New York, New York
August 25, 1989

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[12] If this Court were to declare the revival law unconstitutional it would, as we pointed out to the New York courts below, also be throwing out the thousands of suits involving asbestos and other products also brought under that act. Further, a package of companion tort reform legislation, all passed in one bill with no severability clause, would also die. See Plaintiff's Brief in *Hymowitz*, Court of Appeals, p. 74; L. 1986 c. 682.

No. 89-204

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

MINDY HYMOWITZ and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

ELIZABETH TIGUE, *et al.*,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

vs.

JANE DOLAN and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENT JANE DOLAN

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF IN OPPOSITION FOR RESPONDENT JANE DOLAN

PRELIMINARY STATEMENT

Respondent Jane Dolan respectfully prays that the petition for a writ of certiorari submitted by petitioner E.R. Squibb & Sons, Inc. be denied in all respects. The petition sets forth no valid grounds for the grant of certiorari, as there is no basis to the constitutional challenges asserted therein.

All of the cases which are the subject of this petition are actions which have been commenced on behalf of various plaintiffs to recover damages for personal injuries arising out of the ingestion by their mothers, during pregnancy, of the drug diethylstilbestrol ("DES"), which was manufactured by various pharmaceutical companies named as defendants in these actions, including the petitioner, E.R. Squibb & Sons, Inc. In each case the drug was ingested many years ago, making positive identification of the manufacturer of the specific drug taken by the mother extremely difficult, if not impossible. In the face of overwhelming evidence that the drug was unreasonably dangerous in that it caused cancer and other serious afflictions in the offspring of women who ingested it, and the fact that none of the manufacturers of the drug ever tested it to determine if it was dangerous in the rush to market the drug for use in preventing threatened miscarriages, the New York Court of Appeals adopted a market share theory of recovery to afford innocent and injured victims of DES an opportunity to obtain compensation for their injuries.

The petitioner contends that the adoption of this market share theory violated the due process clause of the Fourteenth Amendment. We will demonstrate that in adapting tort law to modern fundamental realities, the New York Court of Appeals acted in complete harmony with the requirements of due process.

It is also argued by the petitioner that the Toxic Tort Revival Statute, Laws of New York, ch. 682, § 4, enacted by the New

York Legislature to afford a remedy to victims of DES who had previously been barred by court decisions holding that the statute of limitations for their injuries accrued on the date of last exposure to the drug, and thus were often time-barred before they ever knew that they had a cause of action, is unconstitutional. It will be demonstrated that the statute, which revived for a period of one year all causes of action for injury due to exposure to five toxic substances, including DES, is fully constitutional.

STATEMENT OF THE CASE

A succinct history of the marketing of DES was set forth by New York's Appellate Division, First Department in *Bichler v. Eli Lilly and Co.*, 79 A.D. 2d 317, 436 N.Y.S. 2d 625 (1st Dept., 1981), *aff'd.*, 55 N.Y. 2d 571, 450 N.Y.S. 2d 776 (1982). That history reveals the following:

> "DES is synthesized from a coal tar derivative and is two and a half times more potent than natural estrogen. DES was developed in England in the late 1930's. It has never been patented.
>
> As early as 1939, Lilly and other drug manufacturers filed applications with the FDA for permission to market the drug. These first filings were rejected because the basis of these applications were entirely foreign studies. In order to facilitate the second filing, twelve manufacturers, including Lilly, were convened at the behest of the FDA and agreed to cooperate with each other in the approval process. Thereafter, these twelve worked through a voluntarily formed committee known as the Small Committee, which consisted of representatives of four of these companies and which was chaired by Lilly. Dr. Klumpp, the Chief

Medical Officer of the FDA, who had requested the meeting, testified that he was told the Small Committee was formed to expedite the handling of the investigations and would represent the industry. The Small Committee pooled all clinical data pertaining to DES for submission. Lilly's literature became the model for the literature used as the package insert. This literature contained warnings that use of the drug was contraindicated only for women who had cancer or precancerous lesions of the breast or cervix, or had a family history of high incidence of breast or genital malignancy. At this trial, Dr. Hines, Chairman of the Small Committee and the physician heading Lilly's DES project in 1939 and 1940, testified that in conjunction with the work on the drug, he believed he had read every article he could obtain on DES. Although the subsequent FDA approval was limited to use for several conditions, none of which related to pregnancy, there was evidence presented at trial that Lilly was even then contemplating use of DES for toxemia in pregnancy.

In 1947; Lilly and other drug companies filed supplemental applications with the FDA for permission to market DES for treatment of certain complications of pregnancy involving early termination of the pregnancy or death of the fetus. The dosage contemplated for this use was several times stronger than the maximum permitted in 1941. This application was made primarily on the strength of two studies by independent researchers, which indicated that DES therapy saved a

significant percentage of such high risk pregnancies.

Despite the favorable indications of the specific studies relied on, serious questions had also been presented, some prior to FDA approval and others prior to use by plaintiff's mother, concerning the drug's potential carcinogenic effect and its efficacy for accidents of pregnancy.

Expert testimony was presented at trial to establish the state of scientific knowledge at the time of application to the FDA and during the following years prior to the date DES was prescribed for Mrs. Bichler. It was well known, before FDA approval was sought, that substance given a pregnant woman would pass through the placenta into the fetus. It was also well known, that there were available tests on mice which, if conducted, would have demonstrated within six months the danger of cancer developing in the fetus after it had reached its maturity. In fact, three prominent Chicago physiologists had administered DES to rats and mice in 1939 and concluded that the hormone crossed the placenta and had malforming action on the fetus. In 1938, Dr. Charles Dodds, one of the British researchers responsible for synthesizing DES, had published a paper with respect to his findings in relation to DES. In his summary of conclusions, Dr. Dodd stated that DES could actually cause miscarriages or abortions, not save them. In the late 40's, one of the studies cited in Lilly's supplemental application specifically questioned:

1. Will diethylstilbestrol in large doses cause pituitary or other glandular imbalance which will become manifest later in life?

2. Is diethylstilbestrol in such large doses carcinogenic, and as such unsafe to give even to pregnant women?

3. Can diethylstilbestrol in any way affect the glandular balance of the child in utero, particularly the male child?

Rosenblum, G., Melinkoff, E., Preservation of the Threatened Pregnancy with Particular Reference to the Use of Diethylstilbestrol, 55 Western J. Surg. Obstet & Gynec. 597, at 601 (Nov. 1947). These reservations, however, were not noted on the application. Several other studies appearing in the period 1950-1953 questioned the efficacy of DES for complications of pregnancy. There was, therefore, in existence in the period before Mrs. Bichler's consumption of DES not only doubts as to efficacy but also scientific criticism of the lack of proper controls in those studies which had advocated use of DES. Despite these reservations, it is undisputed that none of the companies producing or marketing DES had performed any tests on the drug's effect on the fetus itself, either in humans or in animals, although DES was specifially aimed at the placenta and fetus.

As a result of several medical studies linking use of DES and similar synthetic estrogens to the subsequent development, after a latent period, of vagina carcinoma in the user's daughters, exposed

> to the drug in utero, the FDA in 1971 contraindicated DES for use by pregnant women due to its probable danger and ineffectiveness." 436 N.Y.S. 2d at 628-630.

(The foregoing quotation omits footnoting which can be found in the pages cited.)

When women who had been injured as the result of their exposure to DES wanted to be compensated for their injuries by the drug companies which had marketed the product, most found that they were unable to identify the specific manufacturer of the drug which had been ingested perhaps twenty years prior to the development of their injuries.

There are several reasons why product identification could not be made in most DES cases. First, DES was, for the most part produced in a generic form which did not contain any clearly identifiable shape, color or markings. DES was a fungible drug produced with a chemically identical formula, and often pharmacists would fill DES prescriptions from whatever stock they had on hand, whether or not a particular brand was specified in the prescription.

Second, many drug companies did not keep or cannot presently locate pertinent records as to when, where, and what type of DES they produced or marketed. Similarly, because of the passage of many years between the injured parties' in utero exposure and the manifestation of cancer and other illnesses, those who have been injured by DES do not have records identifying the type of DES prescribed for and taken by their mothers [*see Collins v. Eli Lilly Co.*, 116 Wis. 166, 342 N.W. 2d 37, 44 (1984)].

Under the above circumstances, courts all over the country have found it necessary to fashion remedies to enable those injured

by DES to obtain compensation from the drug companies who placed and kept the drug on the market despite the fact that it was inadequately tested, was a known carcinogen, and was totally useless for the purpose for which it was marketed.

These remedies have been predicated on differing theories of liability, including market share liability [*see Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980), *cert. denied*, 449 U.S. 912, 101 S. Ct. 2985; *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521 (D. Mass. 1985); *see also, McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983)]; market share alternate liability [*see Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984)]; concert of action [*see Bichler v. Eli Lilly & Co.*, 55 N.Y. 2d 571, 450 N.Y.S. 2d 776 (1982); *Abel v. Lilly & Co.*, 418 Mich. 311, 343 N.W. 2d 164 (1964)]; risk contribution [*see Collins v. Eli Lilly Co.*, 116 Wis. 166, 342 N.W. 2d 37 (1984)]; and alternative liability (*see Abel v. Lilly & Co., supra*).

The common thread in these cases was best expressed by the Court in *Sindell, supra*:

> "In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." 26 Cal. 3d 588, 610, 163 Cal. Rptr. 132, 144, 607 P.2d 924, 936 (1980).

In addition to the problem of manufacturer identification, many plaintiffs in New York faced a second obstacle to obtaining

compensation, the statute of limitations. Since many of the unfortunate sequalae produced by DES were not manifested until 20-25 years or more after birth, a great number of DES victims did not become aware of the fact that they had been injured by the drug until the limitation period, even allowing for tolling on the basis of infancy, had passed. The problem was exacerbated by judicial holdings that the statute of limitations accrued not at the time that the injury was discovered, but at the time that the drug was last ingested by the mother, *see, e.g., Fleishman v. Eli Lilly and Company,* 62 N.Y. 2d 888, 478 N.Y.S. 2d 853 (1984), *cert. denied,* 469 U.S. 1192, 105 S. Ct. 967. Thus, many of these victims were placed in the untenable position that there never was a time in which they could sue to recover damages for their injuries.

In an effort to deal with the dilemma, the New York Legislature passed a Toxic Tort Revival Statute which revived the causes of action of these DES victims, as well as those of others claiming injury from four other designated substances, for an additional one year period. That statute, Laws of New York, ch. 682, § 4 reads as follows:

> "§ 4. Notwithstanding any other provision of law, including sections fifty-e and fifty-i of the general municipal law, section thirty-eight hundred thirteen of the education law and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented, every action for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinylchloride upon or within property which is barred as of the effective date of this act or which

was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act; provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which was not barred as of the date of the decedent's death and could have been brought pursuant to section 5-4.1 of the estates, powers and trust law, and provided, further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required.

This section shall not be applicable to any action for medical or dental malpractice."

When all of the DES cases represented by this petition came before the New York Court of Appeals, it was faced with the following problems:

1. Should New York fashion a remedy to permit those DES plaintiffs who were unable to identify the specific manufacturer of the drug taken by their mothers to assert their causes of action, and, if so, what should be the nature of that remedy?

2. Was the Toxic Tort Revival Statute constitutional?

In answer to the first question the Court of Appeals found that indeed there should be some form of non-identification

liability in New York. As the Court stated:

> "We conclude that the present circumstances call for recognition of a realistic avenue of relief for plaintiffs injured by DES. These appeals present many of the same considerations that have prompted this Court in the past to modify the rules of personal injury liability, in order 'to achieve the ends of justice in a more modern context' (see, *People v. Hobson*, 39 N.Y.2d 479, 489; *Codling v. Paglia*, 32 N.Y.2d 330, 341), and we perceive that here judicial action is again required 'to overcome the inordinately difficult problems of proof' caused by contemporary products and marketing techniques (see, *Bichler v. Lilly & Co.*, *supra* at 579-580 [quoting *Caprara v. Chrysler Corp.*, 52 N.Y. 2d 114, 123]).
>
> Indeed, it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the insidious nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers. This is particularly so ,where the legislature consciously created these expectations by reviving hundreds of DES cases. Consequently, the ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES (see, *Woods v. Lancet*, 303 N.Y. 349, 355; see, also, Kaye, *The Human Dimension in Appellate Judging; A Brief Reflection on a Timeless Concern*, 73 Cornell L. Rev. 1004).

> We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions. Given this unusual scenario, it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action." (App. 10a-11a).

After discussing and rejecting various alternatives the Court of Appeals declared that it would adopt a market share theory using a national market. Liability would thus "correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public at large" (App. 17a). Because liability would be based on the overall risk produced, rather than by causation in a single case, the Court did not allow exculpation of a defendant who, although a member of the market producing DES for pregnancy use appeared not to have caused a particular plaintiff's injury. A defendant could exculpate itself, however, if it was not a member of the national market of DES marketed for pregnancy. Liability would be several only, and not joint and several.

The Court also found the revival statute to be constitutional. According to the Court it did not violate due process under either the federal standard, citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137 (1954), or the more stringent New York standard, which in some cases had required exceptional circumstances to revive a personal cause of action, *see Gallewski v. Hentz & Co.*, 301 N.Y. 164 (1950), since the circumstances

requiring the enactment of the statute under consideration clearly met the latter standard. The Court further held that the statute did not violate the equal protection clause, since the statute did not violate any fundamental right, and had a rational basis.

REASONS FOR DENYING THE WRIT

I.

The decision below applying market share liability to afford injured victims of the drug diethylstilbestrol their day in court despite their inability, through no fault of their own, to identify the individual manufacturer of the drug taken by their mothers during pregnancy, does not violate the due process clause of the Fourteenth Amendment.

Squibb tells the Court in its petition that the portion of the decision of the New York Court of Appeals which adopts the market share theory of non-identification liability violates due process by "allowing damage awards where there is no reasonable link between liability and the plaintiff's alleged injury, as well as where a defendant concededly could not have caused the plaintiff's injury". Examination of the decision, however, reveals that Squibb's objection is entirely unfounded.

It is simply untrue to say that in these cases there will be no reasonable link between liability and the plaintiff's alleged injury. What the Court of Appeals did was "to apportion liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public at large" (App. 17a). Since all of the defendants produced a drug from an identical formula and the manufacturer of the DES which caused a particular plaintiff's injuries cannot be identified through no fault of the plaintiff, this is indeed, as the Court phrased it, "an equitable way to provide plaintiffs with

the relief they deserve, while also rationally distributing the responsibility for plaintiff's injuries among defendants" (App. 17a).

It is crucial to remember here that each plaintiff has been wronged by the entire DES industry, and not just by the manufacturer of the pill taken by her mother. Under the circumstances, lack of identification of that manufacturer should not be fatal to a plaintiff's action.

Nor is there any fundamental unfairness in the Court's decision to disallow exculpation. As the Court put it:

> " . . . because liability here is based on the overall risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here." (App. 17a).

The decision represents the implementation by the Court of sound social policy. In addition to the sensible rationale that underlies many of the decisions permitting non-identification liability in DES cases, *i.e.*, that as between an innocent plaintiff and a defendant who produces an unreasonably dangerous drug, the latter should bear the cost of the injury, the California Court in *Sindell* added:

"From a broader policy standpoint, defendants

> are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, '[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.' (24 Cal.2d p. 462, 150 P.2d p. 441; see also 1 Rest.2d Torts, § 402A, com., c, pp. 349- 350.) The manufacturer is in the best position tc discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 129, 104 Cal.Rptr. 433, 501 P.2d 1153; *Beech Aircraft Corp. v. Superior Court* (1976) 61 Cal.App.3d 501, 522-523, 132 Cal.Rptr. 541.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometime permanent, sometimes fatal, injuries caused by deleterious drugs." *Sindell v. Abbott Laboratories, supra*, 607 P.2d at 936.

Interestingly, other than a passing reference to possible problems made by one Federal District Judge in *Tidler v. Eli Lilly*, 95 F.R.D. 332 (D.D.C. 1982), we are aware of no court among the many that have considered the DES non-identification question that has refused to apply a non-identification theory on a constitutional basis.

Squibb then tells us that the New York Court of Appeals decision unfairly shifts burden of proof requirements by exempting

plaintiffs from the requirement that they prove by a fair preponderance of the evidence that the defendants caused their injuries.

There is no such unfair shifting of burden of proof requirements. In order to recover from a particular defendant a plaintiff must still prove by a fair preponderance of the evidence:

1. that the defendant marketed an unreasonably dangerous drug;

2. that the drug caused the injuries suffered by that plaintiff;

3. damages.

If the plaintiff cannot prove any one of the elements she cannot recover and the defendant's market share becomes irrelevant. The defendant may still exculpate itself entirely by demonstrating that it was not a member of the national market of DES marketed for pregnancy. Under those circumstances there is no real shifting of burden of proof requirements.

Nor does the so-called "irrebuttable presumption" to which Squibb objects furnish any basis for a valid due process objection. There is no such irrebuttable presumption, as defendant claims, that because Squibb produced DES it produced the DES taken by every plaintiff's mother. The Court of Appeals decision does not rest on any such fictitious presumption but on the theory that if Squibb marketed an unreasonably dangerous drug which caused injury to members of the public at large, who through no fault of their own, cannot identify the actual manufacturer of the doses to which they were exposed, then Squibb should be obligated to compensate those plaintiffs for damages sustained in proportion to its share of the DES market. This is not the creation of an

irrebuttable presumption, but of a rule of substantive law, something that is well within the constitutional province of the courts to do, *City of New Port Richey v. Fidelity & Deposit Co. of Maryland,* 105 F.2d 348 (5th Cir., 1939).

Finally, Squibb argues that the New York Court of Appeals decision amounts to impermissible judicial legislation. What Squibb overlooks in making this argument, is that tort law has traditionally evolved through decisions of state courts which must constantly adapt the law to the changing needs of society. In the field of product liability, it was the state courts which eroded the citadel of privity and gave us the doctrine of strict liability. This Court never held in such cases that the state courts had usurped legislative powers, recognizing the need for the courts to act in an area in which legislatures have been notoriously silent.

Similarly, when Congress failed to act in a particular area this Court recognized the need for our courts to impose new rules consistent with modern knowledge in *Funk v. United States,* 290 U.S. 371, 381-382, 54 S. Ct. 212, 215 (1933), when it said:

> "It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but, if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?"

The New York Court of Appeals, which has an admirable tradition of leadership in the field of tort law, in *Woods v. Lancet*, 303 N.Y. 356, 355 (1951), referred to the above pronouncement by this Court in *Funk*, and commented that "[n]o reason appears why there should not be the same approach when traditional common law rules of negligence result in injustice".

The Court went on to say:

> "The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield's answer to that, see U. of Toronto L.J. article, supra, p.292, will serve: 'if that were a valid objection, the common law would now be what it was in the Plantagenet period.' And we can borrow from our British friends another mot: 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred'. Lord Atkin in United Australia, Ltd. v. Barclay's Bank, Ltd., [1941] A.C. 1, 29. We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.
>
> The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule." 303 N.Y. at 355.

Similarly, in *Flanagan v. Mt. Eden General Hospital*, 24 N.Y. 2d 427, 301 N.Y.S. 2d 23 (1969), the New York Court of Appeals,

in holding that the statute of limitations runs from the date of discovery in foreign object medical malpractice cases, made a basic change in prevailing common law without waiting for the Legislature to act. The Court pointed out:

> "Our decision does not encroach upon any legislative prerogatives. The legislature did not provide that the statute of limitations should run from the time of the medical malpractice. This Court did. Therefore, a determination that the time of accrual is the time of discovery is no more judicial legislation than was the original determination. Granted the legislature could have acted to change our rule; however, we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a time has elapsed and the legislature has not seen fit to act." 24 N.Y. 2d at 434, 301 N.Y.S. 2d at 29.

The Court recognized the problems of the whole political process involved in changing the time worn legislative rules of law.

> "Just recently a bill providing for a discovery rule was acted upon favorably by the Assembly only to fail to be reported out of the Senate Committee. Are we to hold that a majority of a legislative committee, who give no reason for their failure to allow the whole body to vote on a measure, impart a legislative judgment which must be transmuted into a conclusive legislative intent? The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation. Legislative inaction is

a weak reed upon which to lean in determining legislative intent." 24 N.Y. 2d at 433, 301 N.Y.S. 2d at 28.

In our case the legislative inaction in all likelihood was with a view toward permitting the Court of Appeals to develop a logical solution to the non-identification problem. When the New York Legislature enacted the Toxic Tort Revival Statute, reviving the claims of DES victims for a period of one year, it was well aware that the majority of those victims were unable to identify the specific manufacturer of the drug which their mothers had taken. It is illogical to assume that the Legislature would have created an illusory remedy that would confer no real benefit on the great majority of the class that it was intended to benefit.

Thus, there is no fundamental unfairness sufficient to offend the due process clause in the decision of the Court of Appeals establishing market share liability in DES cases. The petition, insofar as it seeks further review by this Court of that determination, should be denied.

II.

The Toxic Tort Revival Statute enacted by the New York Legislature is not unconstitutional in any respect.

The revival statute does not offend traditional notions of due process. Indeed, having been passed as a long overdue legislative response to an unfair situation, the statute is fully constitutional.

This Court has on more than one occasion specifically upheld the constitutionality of revival statutes, *Campbell v. Holt,* 115 U.S. 620, 6 S. Ct. 209 (1885); *Chase Securities Corporation v. Donaldson,* 325 U.S. 304, 65 S. Ct. 1137 (1954). The history of and rationale underlying such holdings was accurately summarized by the Court in *In Re Agent Orange Product Liability Litigation,* 597 F. Supp. 740 at 811-813 (E.D.N.Y. 1984):

> "State statutes reviving time-barred actions are not prohibited by the due process clause of the Fourteenth Amendment. The Supreme Court has characterized statutes of limitations as representing a public policy about the privilege to litigate. . . [T]he history of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
>
> *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945). The Court, reaffirming its analysis first voiced in *Campbell v. Holt,* 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885), concluded 'as a matter of constitutional law, . . . statutes of limitations go to matters of remedy not to destruction of

> fundamental rights,' and are, therefore, rules in which flexibility rather than stability is of prime importance. 325 U.S. at 314, 65 S.Ct. at 1142. The Chase Court held that the Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation . . . [I]t cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.
>
> * * *
>
> This is a classic instance of the granting of legislative relief in a situation where the arbitrary application of the statute of limitations would work injustice. As the legislature recognized, in the case of a disease of an insidious character, the effects of which might be latent or long delayed, the right to compensation might be barred by the operation of the Statute of Limitations even before the claimant was aware of the fact that he had the disease. In these circumstances, the legislature did no more than to comply with the simple demands of justice in relieving innocent claimants of the effect of the statutory time limitations which would otherwise bar their rights to compensation."

The same rationale under which it was held that the Agent Orange Revival Statute was constitutional insofar as it revived claims for personal injuries arising out of exposure to Agent Orange, is equally applicable here to plaintiff's claims for personal injuries arising out of exposure to DES. The Legislature quite properly determined that the circumstances surrounding DES injuries were exceptional, in that DES victims were suffering from

serious diseases, the existence of which were often not discoverable until after the expiration of the applicable statute of limitations. It would have worked a terrible injustice upon these victims to forever bar their claims.

Finally, defendants take the position that by limiting the revival legislation to five designated substances, the Legislature has created an arbitrary classification which violates defendants' rights to equal protection of the law.

There is nothing arbitrary about the selection of the five substances enumerated in the statute. These substances were encompassed within the bill because all were substances for which victims had been identified, and for which a causal relation had been demonstrated between ingestion or exposure and injury. As such, the inclusion of these five substances was a reasonable classification.

The toxic tort revival statute was an intelligent, humane exercise of power by the New York Legislature. It is entirely consistent with accepted constitutional principles and should be permitted to stand as a reasonable method of opening our courtroom doors to injured people for whom these doors have remained shut for an excessive period of time.

CONCLUSION

For the foregoing reasons, petitioner's request for the grant of a writ of certiorari should be denied.

Respectfully submitted,

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No. 89-204

(5)

Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

E.R. SQUIBB & SONS, INC.,

Petitioner,

– against –

MINDY HYMOWITZ and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

(For Continuation of Caption See Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT, ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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E.R. SQUIBB & SONS, INC.,

Petitioner,

– against –

ELIZABETH TIGUE, ET AL.,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

– against –

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

QUESTION PRESENTED

Does a state statute which revives for one year otherwise time-barred toxic tort claims satisfy the requirements of due process and equal protection under the United States Constitution?

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No. 89-204

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT, ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Introduction

These actions challenge the constitutionality of Section 4, Ch. 682 of the Act of July 30, 1986, 1986 N.Y. Laws 1567.[1] The statute which became effective on July 30, 1986, revives for a period of one year, actions for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol ("DES"), tungsten-carbide, asbestos, chlordane or polyvinyl-chloride, which were "barred as of the effective date of this act or which [were] dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired. . . ." 1986 N.Y. Laws, ch. 682, § 4.

Petitioner E.R. Squibb & Sons, Inc. ("Squibb") and cross-petitioner Eli Lilly & Company ("Lilly") (hereinafter "petitioners")[2] seek review of a judgment of the Court of Appeals of the State of New York, dated April 4, 1989 (75a),[3] which *inter alia*, unanimously upheld the revival statute as constitutional. Specifically, the Court held that revival of DES claims that had been barred as of the date of the act did not violate petitioners' rights under the Due Process or Equal Protection Clauses of the United States Constitution.[4] The Court limited its holding to

---

[1] Petitioner and cross-petitioner also challenge the Court's adoption of a market share theory for determining liability and apportioning damages in DES cases. Respondent Attorney General of the State of New York intervened below solely in defense of the constitutionality of the revival statute, and addresses only that issue in this brief.

[2] Defendants below were Eli Lilly and Company, Abbott Laboratories, The Upjohn Company and E.R. Squibb & Sons, Inc. Only E.R. Squibb & Sons, Inc. and Eli Lilly and Company have petitioned for certiorari on the constitutionality of the revival statute.

[3] References to a number followed by the letter "a" refer to pages in the Appendix to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York. References prefixed "R.____" refer to pages in the Record on Appeal in the Court of Appeals.

[4] The Court also held that the revival statute was constitutional under the New York State Constitution. See discussion *infra* at p. 8.

DES claims because no producers of the other named substances or plaintiffs alleging injury therefrom were before the Court.

The petitions should be denied because revival of the barred DES claims was both reasonable and nonconfiscatory. Thus, revival of these claims did not result in a taking of petitioners' property without due process. Petitioners have also not been denied equal protection of the laws. It was rational for the Legislature to revive the barred DES claims, in order to correct for the past injustice to these claimants from the exposure rule statute of limitations, and it was rational to revive claims of only five substances, because these substances involved groups of victims who had been identified and whose injuries were known to be caused by ingestion or exposure to these substances, and because limiting revival to these substances ensured cost and insurance predictability.

STATEMENT OF THE CASE

A. *The Facts*

Respondent Mindy Hymowitz ("respondent") was born in New York City on December 11, 1954.[5] She first learned that she was a DES-exposed daughter in 1974 when a physician told her she had adenosis.[6] When she was 24 years old, in 1979, she was informed that she had developed clear cell adenocarcinoma, a malignancy.

As a result of the malignancy, respondent, at the age of 24, underwent surgery for removal of her uterus, cervix and most of her vagina. During surgery, a nerve was severed, causing her

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[5] In addition to Mindy Hymowitz, Elizabeth Tigue and Jane Dolan commenced actions against petitioners. The Attorney General intervened only in the case of Mindy Hymowitz.

[6] Adenois is the abnormal development or formation of gland tissue. Dorland's Illustrated Medical Dictionary, 26th ed. (1981).

to have permanent loss of bladder control. Because Mindy Hymowitz lived in New York State, she was barred from seeking compensation from those responsible for her injuries, for New York's statute of limitations provided that an action for personal injury had to be commenced within three years after exposure (N.Y. Civ. Prac. L. & R. § 214), subject to tolling. See N.Y. Civ. Prac. L. & R. § 208. Respondent's time to sue had run in 1975, approximately 4 years before she learned she had cancer. According to all her doctors, the injuries respondent sustained were due to DES exposure.[7]

B. *The Toxic Torts Act — Chapter 682 of the Laws of 1986*

For decades, New York's statute of limitations for actions for damages for personal injury or injury to property provided that subject to applicable tolling provisions, an action must be commenced within three years from the injury. CPLR § 214. Section 214 had been interpreted to mean that a cause of action accrues, without exception, from the date of "last exposure" to an allegedly harmful substance. *See Thornton v. Roosevelt Hospital*, 47 N.Y.2d 780 (1979); *Schwartz v. Heyden Newport Chemical Corporation*, 12 N.Y.2d 212, *cert. denied*, 374 U.S. 808 (1963). Thus, under that statute, plaintiffs had to commence an action within three years of last exposure or of reaching the age of majority, whether or not the effects of the harmful substance had appeared by that time.

To remedy this result, and to provide a remedy to people like Mindy Hymowitz, the Legislature, after many years of debate, passed the Toxic Torts Act, effective July 30, 1986. The act provides that notwithstanding section 214 (the "exposure" rule), the three year period within which to commence an action for injury caused by the latent effects of exposure to any substance shall be computed from the date of discovery of the injury by the plaintiff or from the date "when through the exercise of

[7] Her case was written up in 57 Ob. Gyn. 395 (1981) "Delayed Onset of Clear Cell Adenocarcinoma of the Vagina in DES-Exposed Progeny." (R.513).

reasonable diligence", such injury should have been discovered by plaintiff, whichever is earlier. N.Y. Civ. Prac. L. & R. § 214-c.

The revival portion of the Toxic Torts Act provides that notwithstanding other sections of the Act, if a person or property is injured as a result of the latent effects of exposure to DES, tungsten-carbide, asbestos, chlordane or polyvinyl-chloride, an action may be commenced within one year of the effective date of the statute [July 30, 1986] even if the action would have been barred as of the effective date of the act, or had been dismissed prior to the effective date of this act solely because the applicable period of limitations had expired. 1986 N.Y. Laws, ch. 682, § 4.

The Legislature's purpose in limiting the revival statute to these five substances is explained by the authoritative legislative history. Assemblyman Miller, a co-sponsor of the bill, stated during proceedings on the bill:

> The reason you have these five substances... is because these are the five groups of victims that we have been able to identify. These chemicals and in one instance a drug, because DES is a drug, all are drugs where we have been able to identify victims who have also been able to demonstrate that there has been a causal relationship either between ingestion or exposure and their injury (R.188).

He continued, that the five were picked "after consultations, broad consultations with the victims groups throughout the State of New York and these five substances represent the five substances that we can absolutely [sic] have a causal relationship to injury" (R.190).

And in the Senate, Senator Connor stated that the bill applied "specifically to a population for whom the census is pretty clear, the number of people involved are pretty clear" (R.203). He stated further that although the new section only revived claims for specific toxic substances "[t]here is certainly a possibility in the future of expanding the list" (R.203).

Senator Connor then went on to say that the legislature was only changing a statute of limitations — a procedural measure, not a substantive right, and therefore "there is nothing to prevent a future legislature from changing procedures even further, from perhaps going further and curing some of the shortfallings or shortcomings that may be in this bill as a result of compromise" (R.203-204).

The Attorney General of the State of New York agreed. In his Memorandum to the Governor, he advised that

> Ideally the revival would have applied to all victims regardless of the nature of the chemical to which they were exposed. The five chemicals enumerated do, however, cover the groups who are generally known to have been prejudiced under current law. As other groups are identified, it may be necessary to further amend the revival provisions of this bill (R.287).

The Governor in his memorandum approving the bill explained that the bill was intended to remedy past injustice in the state's statute of limitations for personal or property injury due to the latent effects of toxic substances.

> This measure . . . remedies a fundamental injustice in the laws of our State which has deprived persons suffering from exposure to toxic or harmful substances from having an opportunity to present their case in Court. That injustice results from an archaic rule which commences the three year time period for a suit on the date that exposure occurs. The rule fails to recognize that the adverse effects of many of these toxic substances do not manifest themselves until many years after the exposure takes place. In such cases, a person is barred from Court before he or she is aware of any injury.

* * *

> Most importantly, this measure remedies the injustices suffered by all of the currently known categories of victims of exposure to toxic or harmful substances. These include persons who have suffered serious injuries as a result of exposure to diethylstilbestrol (DES), tungsten – carbide, asbestos, chlordane or polyvinyl-chloride and have been deprived of access to the Courts because their claims were time barred. This bill revives their claims for a one year period and enables them to have their day in Court.

1986 N.Y. Legislative Annual 288.

C. *Prior Proceedings*

On or about April 7, 1987, respondent commenced the instant action, asserting two causes of action for negligence and strict liability, against various manufacturers of DES.[*] She claimed that the action was authorized by the revival statute, and requested compensatory damages of $10,000,000 and $10,000,000 in punitive damages. In their answers defendants claimed, *inter alia*, that the revival statute violated the due process and equal protection clauses of the federal and state constitutions and that the action was time barred. Respondent moved pursuant to CPLR 3211(b) to strike these affirmative defenses.

Defendants below, Lilly, Abbott, and Upjohn, cross-moved for summary judgment and dismissal of the complaint. Defendant Squibb opposed the motion, asserting *inter alia*, that respondent's motion should be deferred pending completion of discovery.

By decision and order entered July 21, 1987, the Supreme Court of the State of New York, New York County (Gammerman, J.) granted respondent's motion to strike the defendants'

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[*] Plaintiff commenced an action against defendants before the statute went into effect. By order dated June 25, 1987 and entered July 24, 1987, the Supreme Court permitted plaintiff to discontinue her first action without prejudice, and granted her leave, *nunc pro tunc*, to commence the second action.

affirmative defenses challenging the revival statute as unconstitutional on equal protection and due process grounds (54a), and denied defendants' cross-motions for summary judgment. *Id.*

The Appellate Division, First Department unanimously affirmed that order upon the decision of the trial judge on April 14, 1988. (35a). On May 24, 1988, the First Department granted defendants' motions for leave to appeal to the New York Court of Appeals.

In its opinion, dated April 4, 1989, the Court of Appeals, agreeing with the lower courts, unanimously upheld the revival statute as constitutional. (19a).

The Court disposed of petitioners' federal due process challenge, stating that "[t]he federal due process clause provides very little barrier to a state legislature's revival of time-barred actions (*see Chase Securities Corp. v. Donaldson*, 325 U.S. 304)" (19a). The Court concluded that, as in *Chase*, in which this Court upheld the revival of a time barred action, statutes of limitations "represent a public policy about the privilege to litigate . . . the history of pleas shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control (*id.* at 314)" (19a).

Moreover, the Court found the revival statute constitutional even under state law, which requires a more stringent level of review, the exceptional circumstances test (20a).

Applying that test, the Court held that because the latent nature of DES injuries is well known, and because in the past the exposure rule prevented the bringing of timely actions for recovery, exceptional circumstances are present and the revival statute which rectifies this injustice is thus constitutional. (20a).

The Court also held that the revival statute, as it pertains to DES, comports with equal protection guarantees, because it has a rational basis: the number of DES caused injuries, and the fact that DES victims were prejudiced by the prior law, was relatively well known by the Legislature, and this allowed for

the ramifications of revival of DES claims, such as the effect on insurance interests and other costs to be reasonably predicted (22a).

The Court concluded that these factors formed a proper basis for the Legislature's decision to revive DES claims now and to wait as to other substances, until they present a problem suitable for resolution. The Court relied upon the principle that equal protection guarantees are not violated by approaching piecemeal what may be a larger problem. (22a).

REASONS FOR DENYING THE WRIT

The petitions should be denied because petitioners have not demonstrated that the Court of Appeals' decision conflicts with any decisions of other state courts of last resort or of federal courts of appeal, or that their constitutional claims are of such public importance as to warrant review by this Court. Although the essence of petitioners' due process and equal protection arguments is that the revival statute violates their rights because it permits revival of those claims which could have been timely brought under the prior exposure-based limitations period and were not, they have not shown that there is a significant number of claimants in this category. Moreover, as will be demonstrated below, revival of the barred DES claims was both rational and nonconfiscatory, and thus, petitioners have not been denied due process or equal protection of the laws.

POINT I

THE REVIVAL STATUTE DOES NOT INTERFERE WITH PETITIONERS' PROTECTED PROPERTY, AND THUS, DOES NOT VIOLATE DUE PROCESS

Petitioner Squibb claims that it has been denied due process because the revival statute interferes with its protected property, to wit, its "distinct investment backed expectations". (Squibb Pet. p. 22). Put simply, Squibb contends that it has based its present and future business decisions, including decisions on insurance and litigation costs upon the expectation that DES

claims, barred as of the date of the revival statute, would no longer be viable.[9] Cross-petitioner Lilly, apparently raises the same claim. Lilly alleges that the prior statute of limitations vested Lilly with rights of repose upon which, under the due process clause, it could rely in making business judgments about insurance and management of litigation and other costs (Lilly Pet. p.10). Neither due process claim has merit.

In support of their claims, petitioners argue that *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), is no longer good law (Squibb Pet. p. 21-22; Lilly Pet. p. 10,n.8). They claim that the due process analysis of property rights set forth in *Chase Securities* does not survive this Court's "[m]odern just compensation analysis [which] identifies protected property by looking to whether state regulation has 'interfered with distinct investment-backed expectations'. (citation omitted)." (Squibb Pet. p. 22). There is no basis for this contention, and indeed, petitioners advance none.[10]

In fact, prior to *Chase Securities*, in the seminal case of *Campbell v. Holt*, 115 U.S. 620 (1885), and since *Chase Securities*, federal courts have consistently upheld state statutes reviving time-barred actions, based on the recognition that the expiration of a statute of limitations creates no "vested interest" in a

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[9] Although petitioner alleged a general "taking" claim below, its investment-backed expectations argument is a new theory never raised in any of the courts below. In all but exceptional circumstances, not present here, this Court has declined to address arguments not raised below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[10] Petitioners argue that the need for review is "highlighted" because two recent state court decisions have invalidated a revival statute similar to New York's. (Squibb Pet. p. 22). This argument must be flatly rejected because the two cases cited by petitioners, *Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989) and *Tyson v. Johns-Manville Sales Corp.*, 399 So.2d 263 (Ala. 1981), not only were decided on state constitutional grounds, but in reliance upon the state constitution provisions that *expressly prohibited* the revival statute in question. Clearly, therefore, those cases are inapplicable, because New York's Constitution does not prohibit revival of barred claims.

right not to be sued. *See IUE v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *In re "Agent Orange" Product Liability Litigation* ("Agent Orange"), 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988). In light of these precedents which have consistently upheld revival legislation for more than one hundred years, petitioners' due process challenge must fail.

Even assuming petitioners had a protected property interest in the statute of limitations, revival of the barred DES claims does not constitute a compensable taking under the fourteenth amendment.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court identified three factors of particular significance in determining whether a taking in violation of due process has occurred: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant and (3) the extent to which the regulation has interfered with distinct investment backed expectations. 438 U.S. at 124.

Examining the revival statute in light of these factors shows that the revival of the barred DES claims does not violate petitioners' rights to due process.

First, the revival statute is remedial in nature, and was enacted to remedy the manifestly unjust result of the exposure-based statute of limitations on the victims of exposure to DES. As such it promotes the health, safety and welfare of the State's citizens. *Penn Central Transportation Co.*, 438 U.S. at 124; *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

Second, although the revival statute may have an economic impact upon petitioners because of the increase in the number of claims, that alone is not unlawful. The revival statute merely gives claimants their day in court. It does not ensure their success on the merits of their claim.

Finally, the revival statute has not interfered with petitioners' investment-backed expectations. Petitioners themselves argue here as they did below, that the revival statute was the result of a political compromise reached after many years of debate. With all the years of debate, petitioners' claim that in making their business decisions, they did not consider the probability that they would have to litigate at least some revived claims, is incredible.

Similarly unavailing is petitioners' claim that under the *Chase* analysis, the revival statute imposes "special hardships" and "oppressive effects" on them. In rejecting this very argument, in *In re "Agent Orange", Product Liability Litigation* ("Agent Orange"), 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988), a case involving the revival of agent orange claims, the district court found that the traditional purpose underlying a statute of limitations – preventing stale claims – was not frustrated by the revival statute:

> Staleness of claims is not a relevant issue in this litigation. Defendants have not lost evidence on their key defenses through the passage of time .... The availability of pertinent information, factual analyses and scientific studies has increased during the interim period facilitating the preparation of the case for all litigants. *Nor are defendants suddenly faced with the reinstigation of an action for which they are unprepared. Defendants have been aware, since not all claims were time-barred, that they would be litigating these issues at some point against some plaintiffs.*

597 F. Supp. at 812-813 (emphasis added).

The same is true of petitioners in this case. They will, in any event, be defending against a sizeable number of claims, many of considerable age, in those states with a discovery based limitations's period. As the trial court below held "loss of evidence over time is not of significance. Defendants have been litigating similar non-time barred DES cases for years." (51a).

In sum, although the revival legislation to some degree readjusts rights and burdens, petitioners have not demonstrated the substantiality of their claim that the readjustment violates their rights under the due process clause.

POINT II

REVIVAL OF THE BARRED DES CLAIMS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE THE CLASSIFICATION IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

Petitioners claim that the classification which (a) singles out DES and four other substances from all other toxic substances and (b) which revives claims arising from exposure to those substances, including claims which could have been timely brought under the prior exposure rule, is irrational, and thus violates their rights to equal protection. To the contrary, the Legislature's decision to proceed initially only with respect to DES and four other substances and to revive claims regardless of whether they might have been timely brought under the prior statute of limitations was reasonable, and thus comports with equal protection guarantees.

In the absence of a classification affecting fundamental rights or creating suspect classifications, equal protection requires only that the challenged classification be "rationally related to a legitimate governmental purpose (citations omitted)", *Kadrmas v. Dickinson Public Schools*, 108 S. Ct. 2481, 2487 (1988). Petitioners' implicit assumption that states must treat all manufacturers of every toxic substance in identical fashion is entirely unfounded. The "Equal Protection Clause does not require that a State . . . choose between attacking every aspect of a problem or not attacking the problem at all". *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). The fact that there are other known toxic or harmful substances which allegedly cause latent harmful effects does not render the classification arbitrary. Indeed, it is well established that reform may take "one step at a time, addressing itself to the phase of the problem which seems most

acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955). Thus, a statute is not unconstitutional because its classifications are imperfect, *Dandridge v. Williams*, 397 U.S. at 485, or are "not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

New York's Legislature determined that the exposure-based statute of limitations was unjust as applied to toxic tort claims because the injuries frequently did not appear before the time to commence an action had run. To remedy this injustice, the Legislature revived only claims related to substances which it believed directly caused the injuries. It also limited the revival to five substances in an effort to contain costs. The revival statute is thus rationally related to the legitimate state interest of remedying past injustice to victims of exposure to DES and four other toxic substances. Accordingly, the statute does not violate the equal protection clause.

Petitioners argue, however, that because the prior law did no injustice to those victims of DES exposure who could have brought a timely action, inclusion of these claims renders the statute irrational and therefore unconstitutional.

The revival of all barred DES claims is eminently reasonable. As the Court of Appeals found

> [s]ome plaintiffs may have known of their injuries a day, or a week, a month, or perhaps longer, before the original limitations period ran. Some may have known of their exposure, but did not develop injuries during the limitations period. Others may have known of some effect upon them of DES exposure, which became cancerous only after any action would have been time barred. (21a).

The Court thus correctly concluded that under the circumstances it was reasonable for the Legislature to revive all

DES claims uniformly for one year, rather than for the courts to "begin drawing arbitrary lines transecting this area's shades of gray." (21a). Thus there is no "special" or "important" reason for this Court to grant the petition or cross-petition.

CONCLUSION

For the foregoing reasons, the petition and cross-petition for a writ of certiorari should be denied.

Dated: New York, New York
September 28, 1989

Respectfully submitted,

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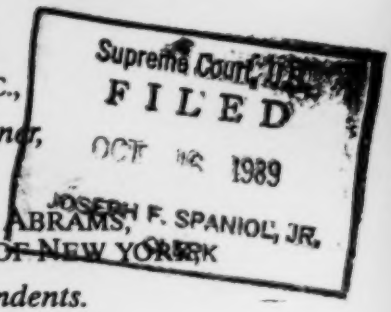
(6)

No. 89-204

IN THE

Supreme Court of the United States

October Term, 1989



E. R. SQUIBB & SONS, INC.,
Petitioner,
-against-
MINDY HYMOWITZ and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

E. R. SQUIBB & SONS, INC.,
Petitioner,
-against-
ELIZABETH TIGUE, et al.,
Respondents.

E. R. SQUIBB & SONS, INC.,
Petitioner,
-against-
JANE DOLAN and ROBERT ABRAMS,
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CONSTITUTIONAL AND STATUTORY PROVISIONS

N.Y. Civ. Prac. L. & R. § 208 (McKinney Supp. 1989) 8

INTRODUCTION

The significance of the constitutional questions presented by this appeal is apparent from the briefs in opposition. Respondents recognize that non-identification and non-exculpation liability raise difficult issues that have sharply divided the lower courts. Indeed, the very language used and concerns expressed by the court below about the rule it adopted (*see* pp. 3-4 below) demonstrate the need for this Court to establish constitutional parameters to circumscribe the states' development of their common law in this area.[1]

The briefs in opposition also appear to concede a number of matters of particular significance to that constitutional inquiry.

First, respondents concede that due process requires a plaintiff in a civil action for money damages to prove the elements of his or her cause of action by a preponderance of the evidence. *See* Squibb's Petition for Certiorari ("Squibb Pet.") at 15-17; Brief in Opposition for Respondent Jane Dolan ("Dolan Br.") at 15-16; Tigue Brief in Opposition in Nos. 89-168 and 89-204 ("Tigue Br.") at 2, 13.

Second, respondents do not dispute Squibb's showing (Pet. at 13-14) that the identification of a defendant as responsible for causing a plaintiff's injuries is a fundamental element of a civil tort action. Rather, they argue that "collective liability" (Tigue Br. at 8) may be imposed upon any one of hundreds of potential defendants because each of them allegedly created a "risk to the public at large". That argument, however, ignores the holding below—and the numerous decisions elsewhere—that have expressly rejected all recognized theories of joint liability in DES suits. *See* p. 6 below. Because the identification requirement performs a unique function in constitutional terms, its abrogation—particularly

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1 *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (establishing minimum constitutional standard for libel suits brought by private individuals: "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability").

when combined with the elimination of any opportunity for exculpation—raises serious constitutional questions.

Third, respondents essentially admit that defendants in these cases comprise less than 50% of the "national market" for DES. *See* Tigue Br. at 5, 10 n.8.[2] Thus, it is impossible as a matter of law for respondents to prove by a preponderance of the evidence that Squibb produced the DES that allegedly injured them. Yet the decision below would hold Squibb liable for its purported "market share" of whatever sums every New York plaintiff could convince each jury to award.

Fourth, respondents do not dispute that all of the conditions allegedly caused by DES can in fact occur in women who were never exposed to the drug. By contrast, when this Court upheld a retroactive compensation system enacted by Congress after extensive investigation, the condition involved, black lung disease, was "a distinct clinical entity" "caused by long-term inhalation of coal dust." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6-7 & n.2 (1976). No such certain connection between DES exposure and plaintiffs' alleged conditions is possible here.

Finally, respondents make much of "social policy" arguments, which they say favor compensating plaintiffs who "through no fault of their own" cannot identify the proper DES manufacturer to sue. *See* Dolan Br. at 13-15. What respondents ignore, however, is that the passage of time has made identification equally difficult for defendants. With the evidence in equipoise at best, due process does not permit a court to take a defendant's property and award it to a plaintiff. Concepts like risk-spreading and cost-avoidance (*see* Dolan Br. at 14-15) may make sense when they are applied in a generally prospective manner. Here, however, the decision

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2 Even under the leading California cases adopting market share liability (and assuming its constitutionality), it would be an "injustice" to award damages when defendants represent only a minority of the DES market. *See Brown v. Superior Court*, 44 Cal.3d 1049, 1073, 245 Cal. Rptr. 412, 427, 751 P.2d 470, 485 (1988) ("to diminish the injustice" of non-identification liability, manufacturers of a "substantial share" of DES must be named as defendants).

below attempts to apply them retroactively to punish a narrow class of defendants arbitrarily.

I. Review at This Time Will Promote Federal Interests and Enhance Judicial Economy.

Respondents urge denial of the writ because the judgments below remanded these cases for further proceedings. Tigue Br. at 6. Beyond the conclusory claim that only after trial "would an adequate factual record exist" (*id.*), respondents have failed to identify any factual questions that would, after remand, further illuminate the federal questions raised here. On the other hand, if New York's DES liability scheme is unconstitutional, Squibb should not be forced to defend itself in the hundreds of pending New York cases where plaintiffs concededly cannot prove that Squibb caused their injuries. Nor should the lower courts be burdened with hearing cases that ultimately will be reversed on appeal. Accordingly, this Court has jurisdiction to hear this appeal and to resolve the substantial constitutional questions that it presents. *See* Squibb Pet. at 11-12 n.13.

II. New York's Version of Non-Identification "Collective Liability" Is Fundamentally Flawed and Constitutionally Defective.

The briefs in opposition strive mightly to explain away the fundamental irrationality of the decision below, but ultimately they fail to do so. Respondents criticize Squibb for characterizing the decision as "unprecedented" and "radical". *See* Tigue Br. at 8. Yet the dissent below used those very words to describe the decision. *See* Squibb's Appendix to Petition for Certiorari ("App.") at 28a. As demonstrated in Squibb's petition and the cross-petition of Eli Lilly & Co. (No. 89-397), the decision is just that.

Similarly, respondents attack Squibb's arguments that New York's DES rule is unconstitutional because it does not "provide a reasonable link between liability and the risk created by a defendant to a particular plaintiff" (App. 17a); because non-identification "liability will [not] approximate causation" (App. 16a-17a); and because "the chance that a

particular producer caused the injury is often very remote" (App. 9a). *See* Tigue Br. at 1-2, 7; Dolan Br. at 13. Yet the court of appeals itself acknowledged the accuracy of every one of these defects in its rule.[3]

There can be no doubt that a theory of liability that fails to "provide a reasonable link between liability and . . . risk" is unconstitutional. Without a "reasonable link", it is irrational for a court to compel transfer of the defendant's property to the plaintiff. Implicitly acknowledging this point, respondents are left with the unsupportable proposition that the New York rule is constitutional because, by allegedly creating "a risk to the public at large", all DES producers subjected themselves to liability to every member of the public who took the drug.

That argument raises substantial constitutional questions. It amounts to permitting a private plaintiff to use the judicial process to take a defendant's property upon a showing that the plaintiff suffered the same type of injury allegedly caused by defendant's activity—but without showing any further connection between the plaintiff and the defendant's actions. "Risk to the public at large" simply does not establish a sufficient nexus between a private plaintiff and a private

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3 Respondent Tigue's claim that Squibb's reliance on these statements is misplaced (Tigue Br. at 1-2), simply misreads the decision below. In context, all of the statements can reasonably be applied to describe the court's market-share theory.

Respondent Tigue also misrepresents several cases in attempting to argue that other courts have imposed non-exculpation liability (Tigue Br. 9-10). In fact, the cited cases expressly and uniformly permit exculpation. *See Brown*, 44 Cal.3d at 1074, 245 Cal. Rptr. at 427, 751 P.2d at 486 (defendant may "show that another producer made the DES that caused the injury"); *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 174, *cert. denied*, 469 U.S. 833 (1984) (liability imposed "if the defendants are unable to exonerate themselves"); *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1527 (D. Mass. 1985) ("opportunity to present exculpatory evidence"). The general language that respondent quotes is simply acknowledging—as Squibb argues here—that market share liability will inevitably, as a matter of mathematical probability, result in damage awards against defendants that did not in fact supply DES to plaintiff's mother, but that are also unable to exculpate themselves.

defendant to justify a transfer of wealth between them on a retroactive basis.

This due process objection is not met by respondents' claim that "[t]here is no . . . unfair shifting of burden of proof requirements" because a plaintiff still must prove all elements of her cause of action other than the defendant's identity by a preponderance of the evidence. Dolan Br. at 15-16; *see* Tigue Br. at 2, 13. The other elements are simply irrelevant to the due process issues here. That they must be proven shows only that New York maintains a fault system for tort liability. A defendant should not suffer the expense and risk of defense as to any elements of a tort if the plaintiff cannot identify that defendant as the alleged wrongdoer.

In any event, respondents' argument proves too much. Taken to its logical conclusion, it suggests that a state court could eliminate any elements of a common law tort that became too difficult for a class of plaintiffs to prove. If proof of damages were particularly troublesome, a million dollars might be presumed. *Cf. Gertz*, 418 U.S. at 349-50 (presumed and punitive damages in non-actual malice libel cases violate the First Amendment). If proof of defendants' fault (whether under traditional rules or strict liability) were problematic, then any manufacturer of a product might be presumed liable. Although due process obviously does not freeze the "common law . . . in the Plantagenet period" (*see* Dolan Br. at 18), these examples, together with the hit-and-run accident hypothetical posited in Squibb's petition (at 17), suggest that a change in a common-law rule is not "rational" under the Due Process Clause merely because a class of plaintiffs could not prevail without it. The real issue is whether the resulting legal rule brings about an arbitrary seizure of property.

By eliminating the identification requirement and precluding exculpation, New York's DES liability rule has just such an impact. The identification requirement (which logically must incorporate a defendant's right to present exculpatory evidence) affords the defendant direct protection against arbitrary confiscation of its property. It alone ensures that property taken in a judicial proceeding belongs not to a

stranger to the transaction at issue, but to the person responsible for plaintiff's injuries. To abolish the identification requirement, therefore, is to turn courts into "roving commissions", *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), that may fasten liability on any defendant that happens to have acted in a way not inconsistent with the type of harm that plaintiff suffered. It punishes "negligence in the air". *See* Squibb Pet. at 13. To avoid that unacceptable result, courts have repeatedly recognized the fundamental nature of the identification requirement (*id.*)—a point not disputed by respondents. A substantial question is therefore raised by whether the identification element of a tort claim stands on a different constitutional footing from other elements such as privity or standard of care.

Respondents also seek to justify imposition of liability by arguing that "each plaintiff has been wronged by the entire DES industry, and not just by the manufacturer of the pill taken by her mother". Dolan Br. at 14. That argument, however, is flatly inconsistent with the many decisions (including the holding below) that have repeatedly rejected "extant common law doctrines" (App. 10a)—including alternative liability, concerted action and enterprise liability—as a basis for recovery in DES cases. Each of those doctrines contains important substantive protections to preclude "collective liability" (Tigue Br. at 8). It is precisely because DES manufacturers did not act in a "collective" manner that the courts have consistently refused to apply those doctrines. *See, e.g.*, App. 7a-10a; *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, 928-35, *cert. denied*, 449 U.S. 912 (1980). The decision below failed, however, to recognize that the substantive limitations that make recovery unavailable under traditional joint liability doctrines perform the crucial constitutional function of limiting liability only to those defendants that are proven, by a preponderance of the evidence, actually to have injured the plaintiff. *See* Squibb Pet. at 17-18 n.16.

Nor are the constitutional questions answered by limiting a defendant's liability to its "market share". Forcing a defen-

dant to pay even its "market share" raises serious constitutional questions when that defendant should not be liable at all. As noted in Squibb's petition (at 19-20), even Congressional enactments that retroactively "'impose a new duty or liability based on past acts'", *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976), "may be arbitrary and irrational in the absence of any connection between the [defendant's] conduct and some detriment to the [plaintiff]". *See Connolly*, 475 U.S. at 229 (O'Connor, J., concurring).

This case raises precisely the concerns that troubled Justice O'Connor in *Connolly*: The only "connection" between plaintiff and defendant is that plaintiff was a member of the public and defendant allegedly "created a risk to the public at large". Unlike the Congressionally sanctioned adjustments of "the benefits and burdens of economic life to promote the common good," *Connolly*, 475 U.S. at 225, that this Court has upheld, albeit only after careful scrutiny, in cases such as *Connolly* and *Turner*, New York's DES compensation scheme does not contain "a significant number of provisions . . . that moderate and mitigate the economic impact of . . . individual . . . liability." *Id.* at 225-26. *Cf. Turner* at 9 n.8, 26 n.24 (employer's retroactive liability under Black Lung Benefits Act capped at $37,800 per miner). On the contrary, juries remain free to make virtually unfettered damage awards.

III. New York's "Revival" Statute Is Irrational.

In arguing to support the constitutionality of the 1986 New York statute reviving otherwise time-barred claims based on exposure to DES and four other substances (*see* Squibb Pet. at 2, 7), respondents are forced to take positions inconsistent with their arguments on the merits. Their need to do so underlines the significance of the constitutional questions raised by the statute.

For example, when arguing the merits, respondents state that in denying defendants' summary judgment motions, the courts below engaged in "the temporary assumption . . . that

the defendants were liable under New York's product [liability] laws. There have been no findings of liability yet." Tigue Br. at 2. In arguing that singling out DES claims for revival was not arbitrary, however, respondents claim that "a causal relationship had been demonstrated between . . . exposure and injury." Dolan Br. at 23; *see also* Brief of Respondent Robert Abrams, Attorney General ("Abrams Br.") at 5. In fact, plaintiffs' speculative causation claims generally have been rejected by juries. *See* Squibb Pet. at 7.

Similarly, respondents argue on the merits that special liability rules are justified for DES because of the long latency period between exposure and alleged manifestation of injury. (*See* Tigue Br. at 4; Dolan Br. at 7, 12). Respondents seek to justify the revival statute on this basis as well (*see, e.g.*, Abrams Br. at 14), but are then faced with the obvious irrationality of reviving claims that were known during the limitations period,[4] and thereby do not fit within the stated purpose of the statute. Respondents are left arguing, with no persuasive explanation, that excluding such claims from revival would be "arbitrary" (Abrams Br. at 15), when it is in fact their inclusion that is inexplicable.

Respondents also rely on the "authoritative legislative history" (Abrams Br. at 5) to justify revival, yet they ignore the most pertinent legislative pronouncement on the merits: "We are not changing substantive right[s], certainly not retrospectively." *See* Squibb Br. at 20 & n.17. Nor do respondents address the fact that the "authoritative legislative history" indicates a total failure to investigate crucial scientific issues of causation. Rather, the legislative history reveals that the substances covered by the revival statute were picked after one-sided "consultations with the victims groups throughout the State." Abrams Br. at 5. Absent an objective inquiry, singling out DES claims for revival is patently arbitrary.

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4 This could occur with some frequency because under New York law, all statutes of limitation are tolled while the plaintiff is an infant. N.Y. Civ. Prac. L. & R. § 208 (McKinney Supp. 1989).

Even Attorney General Abrams admitted at that time that "[i]deally the revival would have applied to all victims regardless of the . . . chemical to which they were exposed." Abrams Br. at 6. Although imperfect legislative classifications do not necessarily violate equal protection or due process guarantees, the foregoing inconsistencies demonstrate that the legislature's supposed "effort to contain costs" (*id.* at 14) in reality masks a constitutionally impermissible political expediency that led to irrationally singling out DES in the revival statute.

CONCLUSION

For the foregoing reasons, and those discussed in the petitions of Squibb and of Rexall Drug Company in No. 89-168, and in the cross-petition of Eli Lilly & Co. in No. 89-397, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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